

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3
4 LORI WAKEFIELD,)
)
5 Plaintiff,) 3:15-cv-01857-SI
)
6 vs.) April 3, 2019
)
7 VISALUS, INC.,) Portland, Oregon
)
8 Defendant.)

9
10
11 (Pretrial Conference Hearing)

12 TRANSCRIPT OF PROCEEDINGS

13 BEFORE THE HONORABLE MICHAEL H. SIMON

14 UNITED STATES DISTRICT COURT JUDGE
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Pretrial conference proceedings

4

1 (April 3, 2019)

2 P R O C E E D I N G S

3 (Open court:)

4 THE CLERK: Your Honor, this is the time set for a
5 pretrial conference in civil case 15-1857-SI, Wakefield versus
6 ViSalus, Inc.

7 Could I have counsel in court, beginning with the
8 plaintiff, identify yourself for the record. You can do it
9 from the desk if you wish.

10 MR. FRANZINI: Simon Franzini from Dovel & Luner on
11 behalf of plaintiff.

12 MR. ADAMS: Good afternoon. Julien Adams for the
13 plaintiff.

14 THE COURT: Good afternoon.

15 MR. JACOBSON: Jonas Jacobson for the plaintiff.

16 THE COURT: Good afternoon.

17 MR. O'NEAL: Good afternoon. John Maston O'Neal on
18 behalf of the defendant.

19 MR. FOSTER: Zachary Foster on behalf of the
20 defendant.

21 MR. PYLE: Nicholas Pyle on behalf of the defendant.

22 THE COURT: Good afternoon. All right. We are here
23 on a pretrial conference. Trial is scheduled to begin next
24 Wednesday morning, April 10th. What I would like to do,
25 because I think this might be the most efficient way to

1 proceed, would be, first, to take an inventory of really what's
2 left in the case; talk about what the jury needs to decide
3 versus what I need to decide. From there, I think it would be
4 most efficient to talk about some of the motions in limine
5 followed by some of the proposed exhibits from each side,
6 followed by the objections to the designations and
7 cross-designations from the deposition transcripts. At some
8 appropriate time I will talk about how I run the trial, but I
9 think that makes the most sense to me.

10 So as I understand things, the plaintiff has
11 withdrawn her individual Do Not Call Registry claim, which was
12 otherwise known as claim 1; am I correct?

13 MR. FRANZINI: That's right, Your Honor.

14 THE COURT: So really what's all that is left in this
15 case, and we may re-label some of these things to make it
16 easier for the jury to follow, but really what's all that is
17 left is an individual claim brought by the plaintiff under
18 Section 227 for receiving one or more telemarketing calls using
19 an artificial or prerecorded voice to her landline. And the
20 question the jury will have to decide is: Was that landline a
21 residential landline? Also, if so, how many artificial or
22 prerecorded voice calls to that residential landline did
23 plaintiff receive?

24 Then we also have analogous class claims so that the
25 jury will be asked to decide whether or not the defendant

1 placed telemarketing calls using artificial or prerecorded
2 voice messages to either a residential landline or a cellular
3 telephone line of a class member; and if so, how many such
4 calls were made? Put aside the issue of willfulness for a few
5 moments.

6 But putting aside willfulness, do I have it basically
7 right, that that is what the jury needs to decide for
8 plaintiff?

9 MR. FRANZINI: Setting aside willfulness, Your Honor,
10 I think that's right, with the one caveat that Ms. Wakefield is
11 part of the class. So I would say it is really one question:
12 Did ViSalus place telemarketing calls featuring an artificial
13 and prerecorded voice to Ms. Wakefield or to the class? And
14 then two, how many to Ms. Wakefield? Three, how many to the
15 class?

16 THE COURT: Although I think it will probably be
17 easier for the jury to process if we say -- I'll explain to
18 them it is a class and what a class means, and Ms. Wakefield is
19 part of a class. So we are going to start: Were any of these
20 types of calls made to Ms. Wakefield; and if so, how many?

21 The reason I want to do it that way, because if she
22 is the only class rep, if no such calls were made to her, then
23 that's over. We don't go any further. That's how I view
24 things, as she is the class rep.

25 If, however, the jury then says: Yes, one or more

1 calls were made to her, and here are the number of calls made
2 to her. Then ask the jury: All right. How many such other
3 calls were made to the other members of the class -- or were
4 there any other such calls made to other members of the class?
5 If so, yes. And if so, how many?

6 Will that work?

7 MR. FRANZINI: Your Honor, I would like the
8 opportunity -- I guess the one thing I'm not sure about, it
9 could be that we could prove class-wide liability without
10 Ms. Wakefield's claim. So I think Your Honor has suggested
11 that if we don't prove Ms. Wakefield's individual claim, that's
12 the end of the story. I'm not sure that's true.

13 THE COURT: Can you give me a case, and if not now,
14 then really soon, like by the end of day tomorrow, whether or
15 not a class can recover when the class representative has not
16 proven a claim?

17 MR. FRANZINI: We would appreciate the opportunity to
18 brief that, if we can, by tomorrow.

19 THE COURT: Of course. Excellent. That's my
20 tentative thinking right now.

21 Does the defendant have anything to say on that
22 thinking?

23 MR. FOSTER: I do, Your Honor. I wanted to clarify
24 one issue. About six months ago, the parties submitted briefs
25 on proposed jury instructions. As you'll recall, Your Honor

1 hinted what one of those instructions was on, what needed to be
2 proven --

3 THE COURT: How do you decide what is a residential
4 line versus a nonresidential line --

5 MR. FOSTER: And in your order you indicated, or at
6 least our reading of it was, you indicated that whether a call
7 was to a residential landline or a cell phone was not going to
8 be decided at trial for the class members. Instead, it was
9 going to be decided after the fact through some post-trial
10 submissions.

11 THE COURT: I don't recall that. All right. I will
12 go back and take a look at that.

13 MR. FOSTER: Your Honor, the only reason I ask that,
14 obviously we agree that -- it's our position that everything --
15 all the elements of the case need to be proven at the trial for
16 every single class member. If not, they cannot recover.

17 But it was plaintiff's position six months ago that
18 "No, no, no. We don't need to prove the residential landline/
19 cell phone issue. We can do that in a post claims
20 administration process." From what I recall, and my reading of
21 the order, you agreed with that. So we were prepared for a
22 trial where the residential landline and cell phone issue
23 wasn't going to be decided.

24 In fact, the plaintiff, in their briefing, assured us
25 that we had the opportunity in the post-trial process to

1 attack, I guess, affidavits, and we think affidavits would be
2 insufficient, but some sort of proof from the class members.

3 So I guess my first question would be to clarify, how
4 is this case going to proceed? Is this an issue where the
5 class members -- Your Honor, I could find the reference to your
6 order.

7 THE COURT: Please do.

8 MR. FOSTER: 143 maybe.

9 THE COURT: Docket 143? I don't have that here with
10 me. I will have to go back and get it.

11 What is plaintiff's recollection on this issue?

12 MR. FRANZINI: Your Honor, there was some briefing
13 about whether elements of the class claims needed to be proven
14 at trial or not. I don't know that that issue was resolved by
15 Your Honor's order, but our plan and what we have been saying
16 all along in all of our pretrial submissions, in our trial
17 brief, and in our exhibit objections and everything is exactly
18 what we plan to do, which is to present class-wide evidence
19 that ViSalus made calls to either a mobile or a residential
20 landline. That's reflected in our jury instructions and our
21 trial brief and so forth. I don't think there is a live issue
22 about that at this point.

23 MR. FOSTER: From our position, Your Honor, that's a
24 complete reversal in the plaintiff's position in their
25 briefing. It is Docket 149.

1 THE COURT: All right. Let me go pull 149. I want
2 to have it in front of me. I will come back.

3 (Recess.)

4 (Open court; proceedings resumed:)

5 THE COURT: All right. I have Docket 149, my order
6 dated August 24th, 2018, in front of me.

7 So what specifically are you referring to?

8 MR. FOSTER: Your Honor, if you could turn your
9 attention to page 8, the second paragraph. Well, it is
10 essentially that entire --

11 THE COURT: All right. Give me a moment, please.

12 Page 8?

13 MR. FOSTER: Yes. It is part of your entire decision
14 on the nature of class proof. That second paragraph, the last
15 sentence stated, "If an absent class member turns out not to be
16 eligible because that person did not use his or her phone for
17 residential purposes, or for some other reason that releases
18 defendant from liability under the TCPA, the result would be
19 that the defendant owes less in total damages."

20 You're talking about here that we need to do this, in
21 the sentence before, "Because the damages are \$500 statutory
22 damages per claimant" --

23 THE COURT: Hold it. When you are speaking with a
24 court reporter present, and you are reading, please read
25 slowly.

1 MR. FOSTER: Fair enough.

2 "Because the damages are \$500 statutory damages per
3 claimant, with possible trebling by the Court, a post-trial
4 determination of whether a class member is eligible to submit a
5 claim"; i.e., whether they used their landline for residential
6 purposes.

7 THE COURT: I didn't say "i.e." You're adding things
8 to my sentence.

9 MR. FOSTER: Yes, Your Honor --

10 THE COURT: All right. Let me read it to myself.

11 MR. FOSTER: Sure.

12 (Pause in proceedings.)

13 THE COURT: I read everything. What's your argument?

14 MR. FOSTER: My argument, Your Honor, is that we
15 expected to go to trial without the residential landline and
16 cell phone being an issue of fact at trial to be decided by the
17 jury in this trial next Wednesday.

18 THE COURT: One moment.

19 All right. Do you have handy defendant's proposed
20 amended verdict form?

21 MR. FOSTER: I do.

22 THE COURT: That's Docket 215, right?

23 MR. FOSTER: Yes.

24 THE COURT: All right. Mr. Franzini, you may sit
25 down.

1 MR. FRANZINI: Thank you, Your Honor.

2 THE COURT: All right. Let's take a look at the
3 defendant's proposed amended verdict form, which looked pretty
4 good to me, by the way.

5 MR. FOSTER: Thank you, Your Honor.

6 THE COURT: Looking at Count 2, the 227B question on
7 behalf of class members. Defendant proposes as
8 Question No. 10, "Did Ms. Wakefield prove by a preponderance of
9 the evidence that ViSalus placed at least one call to each
10 class member's residential landline or cellular telephone line
11 and placed" -- it says "play," but I know it is "placed" -- "an
12 artificial or prerecorded telemarketing message during each of
13 those calls? Yes or no?"

14 And that's what I've described.

15 Then we go to your question 11. "If the answer to
16 that is yes, answer 11. If the answer is no, skip 11." Let's
17 assume the answer is yes. "Indicate the number of calls that
18 ViSalus placed to the class members' landlines or cellular
19 telephone lines during which ViSalus placed an artificial or
20 prerecorded telemarketing message."

21 Then there is a blank, and they fill in the number.
22 That's all I have been saying.

23 How is that different than what I just said a few
24 minutes ago?

25 MR. FOSTER: Your Honor, we are preserving our record

1 for appeal, again, based on your order what we believed we
2 would be trying and based off of plaintiff's briefing where
3 they said specifically in a footnote, "What is explained in the
4 body, this step is unnecessary, given that the class members
5 can provide simple sworn statements that their phone numbers
6 are residential."

7 THE COURT: I'm not understanding your response to my
8 question. You proposed a verdict form that, in my opinion, is
9 totally consistent with my earlier order, the order of 149.
10 That's how I envisioned it. Frankly, I'm already well along
11 the way in drafting a verdict form that will look precisely as
12 your proposed verdict form reads.

13 Is there a problem with that?

14 MR. FOSTER: No, Your Honor. Again, that was our
15 position. I wanted to clarify. The problem, though, is,
16 again, we believed we were not going to trial on --

17 THE COURT: Then why did you propose a verdict form?

18 MR. FOSTER: Again, to preserve for appeal. If we
19 proposed a verdict form, Your Honor, that --

20 THE COURT: That makes no sense to me. If there was
21 any doubt in your mind as to what my order intended, you should
22 have raised it with me. You should have asked.

23 MR. FOSTER: We didn't have any doubt, Your Honor.
24 We believed, and based off of -- and in conjunction with
25 plaintiff's briefing and your order -- that we were going to

1 trial on everything -- all the elements in the TCPA except the
2 residential landline and cell phone issue.

3 THE COURT: But you put in your proposed verdict form
4 a question that asks the jury how many residential landlines or
5 cellular telephone lines received calls from ViSalus with an
6 artificial or prerecorded message. That's exactly the question
7 that I envisioned we would be asking the jury. That's the
8 question that should be asked of the jury. And that's what I
9 expect to ask the jury next week.

10 Okay. Mr. Franzini, did you want to say anything at
11 all on this point? I don't think I need to hear anything from
12 you on this issue.

13 MR. FRANZINI: I could say more, Your Honor, but I
14 don't think I need to.

15 THE COURT: Okay. I take it that plaintiff doesn't
16 have any objection, in material substance, to the defendant's
17 framing of the questions in defendant's proposed verdict form,
18 Docket 215?

19 MR. FRANZINI: May I have 30 seconds to review it,
20 Your Honor? I think there is one issue that I would like to
21 address.

22 THE COURT: Here is what I'm going to do: I am going
23 to be preparing a set of documents that I'll send to you -- my
24 goal is tomorrow; worst-case scenario, Friday -- and then I
25 will invite you all -- and if you want to do it in person on

1 Monday, you can do it. Otherwise, we will schedule a telephone
2 call. I will invite you all on a Monday conference to give me
3 your objections or exceptions, things like that.

4 The set of documents that I will send to you all will
5 be my voir dire script, my preliminary jury instructions, a
6 pretty far-along draft of my final jury instructions, and
7 verdict form. I'll tell you that my verdict form will look an
8 awful lot like what defendant is proposing in defendant's
9 proposed verdict form, at least on this issue, Docket 215.

10 My plan is to clean it up just a little bit to make
11 it a little bit more simpler for the jury and more precise, but
12 it is going to be that substance. If you then want to make any
13 proposed amendments, adjustments, or tweaks to that, I will
14 give you an opportunity on Monday after you see what I've done.

15 MR. FRANZINI: May I be heard on one issue?

16 THE COURT: Yes.

17 MR. FRANZINI: The one issue with defendant's
18 proposed verdict form on Count 2 for the class is that it would
19 seem to require a call to be placed to each class member. So
20 if there is a single class member for which a call isn't
21 placed, then we would lose on everything, and I don't think
22 that's right.

23 THE COURT: Yes. I understand. I think what they
24 are asking is, were calls made to members of the class that
25 satisfied the following criteria? Yes or no. And if yes, how

1 many such calls?

2 MR. FRANZINI: That's right, Your Honor. We don't
3 have a problem with that.

4 THE COURT: All right. That's the way it is supposed
5 to be.

6 MR. O'NEAL: Judge, to be clear, and I think this may
7 drift into the last order, it is the defendant's contention
8 that plaintiff bears the burden of proving that each and every
9 member of the class received a violative call.

10 THE COURT: And to that extent, I disagree, and I'll
11 overrule that. If the plaintiff presents a class with many,
12 many, many names in it -- let's grab out -- how many names
13 roughly do you think are in the class?

14 MR. FRANZINI: I believe it is 800,000, Your Honor,
15 but I am --

16 THE COURT: If they present 800,000, and the jury
17 finds -- let's just grab a number out of thin air -- half of
18 that, 400,000. Okay, fine. That's going to cap the
19 defendant's liability. Now, that doesn't mean that the
20 defendant has to write a check for \$500 times 400,000. There
21 still has to be a claims process, and we will take it from
22 there what we do with that.

23 But if the defendant's position is that if the jury
24 comes back and finds that there are some members of the class
25 who did not -- let's say did not use a landline, because the

1 class is not limited to just people who had residential lines
2 or cell phones. I think that's right. Let me double-check.

3 I think the class that was certified by Judge Brown
4 before I got this case said the class is defined as: "All
5 individuals in the United States who received a telephone call
6 made by or on behalf of ViSalus:

7 "1. Promoting ViSalus's products or services.

8 "2. Where such call featured an artificial or
9 prerecorded voice; and

10 "3. Where neither ViSalus nor its agents had any
11 current record of prior express written consent to place such a
12 call at the time the call was made."

13 That's how she defined the class for purposes of this
14 claim. That's at Docket 81 at page 6.

15 She did not define the class -- the Court did not
16 define the class, and, frankly, plaintiff didn't ask. She
17 adopted the class definition that the plaintiff requested.
18 Plaintiff didn't ask to define the class as people who received
19 those types of calls on a residential line or a cellular
20 telephone. You didn't ask her to define the class that way,
21 and she didn't define it that way.

22 But you only are entitled to liability for calls made
23 on a residential phone or a cellular phone. So we need to know
24 how many people within this class basically can satisfy the
25 liability elements of this claim.

1 So I'm assuming that the total number of people in
2 the class, 800,000, let's say, is going to be greater than the
3 number of people who can satisfy and show liability under the
4 statute, because the statute requires a call to be made to a
5 residential line or cellular telephone line and excludes -- it
6 doesn't allow for liability to a business line, but your
7 definition of the class includes business line.

8 So I think, by definition, you're probably going to
9 have people that have a pure business line -- or have a
10 business line that may have received a call from ViSalus, and
11 they're not going to be eligible.

12 So we need to ask the jury, frankly, as plaintiff
13 proposed, as defendant proposed, how many people received these
14 types of automated or artificial voice calls to either a
15 cellular phone or a residential landline and excluding business
16 lines?

17 The jury will have to answer that question. They are
18 going to fill in that number, and that number will then cap the
19 amount of liability that defendant may be liable for. And then
20 when we deal with, "Okay, step forward and get your money,"
21 only those people that actually have received calls to a
22 landline residential number, or a cellular telephone, would be
23 eligible.

24 That's how I see it, and that's the way that
25 plaintiff the class to be defined from Judge Brown. She

1 accepted that. Nobody has asked to have any modifications to
2 that. So be it. That's how I see it.

3 Does that answer your question?

4 MR. FRANZINI: Yes, Your Honor. I don't think there
5 is any --

6 THE COURT: All right. By the way, am I also correct
7 that even though the class definition did include the element
8 where neither ViSalus nor its agents had any current record of
9 prior express written consent -- as I understand it, the
10 defendants are not asserting that affirmative defense;
11 therefore, we don't need to ask the jury to determine whether
12 or not, as part of the number that it finds, there was or was
13 not prior express written consent?

14 Am I correct in that, Defendant?

15 MR. O'NEAL: You are, Judge. We are not asserting
16 the consents that were signed meet the requisite statutory --

17 THE COURT: You will see that in my instruction to
18 the jury, but I am going to take that issue so the jury doesn't
19 have to worry about that question.

20 All right. So that really takes us now down to
21 willfulness, on the issue of who decides willfulness, judge or
22 jury. This is an important threshold question, because it will
23 affect a lot of the evidence that gets presented to the jury.
24 If the jury decides that question, then a lot of evidence that
25 is only relevant to willfulness gets presented to the jury. If

1 the jury does not decide that question, and it is only me, then
2 I'm probably -- not even "probably" -- I'm going to not let the
3 jury hear evidence that is only relevant to the question of
4 willfulness or knowingly, because I think that will tend to
5 confuse the jury. If a piece of evidence is relevant only to
6 the question of willfulness or knowingly, a willful or knowing
7 violation, the jury is going to wonder why am I hearing this
8 evidence if it's not part of anything that they need to decide.

9 So let me tell you how I look at it. I note that the
10 defense put in some definitions of willfulness in some of their
11 instructions, but they also said in trial briefing and
12 elsewhere they reserve the right to argue it's a judge
13 question. I've looked at it. Let me tell you my analysis,
14 because I think it is a question for the Court, not the jury.

15 I start with the statutory text of 47 U.S.C.
16 Section 227(B)(3), which provides under the Telephone Consumer
17 Protection Act, a private right of action for violations of
18 (B).

19 It says that -- and I'll paraphrase: A prevailing
20 plaintiff may recover the greater of \$500 in damages for each
21 violation, or actual monetary loss from such a violation,
22 whichever is greater.

23 Then in Section 227(b)(3)(C), the statute continues:
24 If the Court finds that the defendant willfully or knowingly
25 violated this subsection, or the regulations prescribed under

1 this subsection, the Court may, in its discretion, increase the
2 amount of the award to an amount equal to not more than 3 times
3 the amount available under (B) of this paragraph.

4 Now, it looks to me then that because the statutory
5 text by Congress says "if the Court finds the defendant
6 willfully or knowingly violated this subsection," that on first
7 read tells me that it is for the Court to decide. I note that
8 there is cases from the Supreme Court in the Copyright Act
9 context involving the Court and its discretion -- if the Court
10 finds willful violations, the Court in its discretion may
11 increase damages for copyright violations.

12 The Supreme Court in *Feltner v. Columbia Pictures*
13 said that means it is for the judge, not the jury.

14 I would also note there are a number of federal
15 District Court decisions under the TCPA in which the Court
16 decides and has decided whether or not the violation was
17 committed willfully or knowingly and then decides whether or
18 not to increase damages. Frankly, I think that was the way it
19 happened in the *Krakauer v. Dish Network*. That was how it
20 happened in *Asher & Simmons v. J2 Global Canada* out of the
21 District of Maryland. That's what happened in *Adamcik v.*
22 *Credit Control* out of the Western District of Texas. That's
23 how they interpret the statute.

24 I do know there is one state court case at least that
25 held contrary, but I just wasn't persuaded by that state

1 court's analysis.

2 I also look to see what does the Supreme Court teach
3 us on how to decide what is a question for the jury and what's
4 a question for the Court. Nobody briefed this, but I looked at
5 Tull v. United States, a Supreme Court decision from 1987.
6 It's pretty clear to me from that case in this context, in the
7 context of the TCPA case, that is a question for the Court, not
8 the jury.

9 I also note that the threshold question there is, do
10 we have a common law right, a common law property right at
11 issue, or something that's analogous that was recognized by the
12 common law when the Seventh Amendment was ratified in 1791?

13 You know, I don't believe that anything in the TCPA
14 is a common law right or analogous to a common law right, at
15 least analogous to a common law right that existed at the time
16 the Seventh Amendment was ratified.

17 So my tentative, but pretty strong inclination right
18 now, is to say the question of willfulness or knowing violation
19 is for the Court, not the jury. Therefore, if evidence is
20 relevant only to that issue, it can be presented to me. We
21 will talk about an efficient way to do that, but it may not be
22 presented to the jury.

23 Any objection to that from defendant?

24 MR. O'NEAL: If I may ask a follow-up question before
25 addressing the substantive one? What were you envisioning

1 insofar as presenting the evidence to you, Judge?

2 THE COURT: I was going to ask when you wanted to do
3 it. It really depends. It could be done in a couple of ways.
4 If you have a live witness that wants to talk about it, fine.
5 The live witness talks about everything else that is relevant
6 to the jury, then we excuse the jury, and then I'll receive the
7 testimony. Or you make the live witness wait in the hallway or
8 an attorney room somewhere. We wait for a break so I don't
9 interfere with jury efficiency, and then we will call that
10 witness back outside the presence of the jury to give me
11 additional testimony. That's how can we do things with a live
12 witness.

13 Worst-case scenario, I make you come back while the
14 case is with the jury, and you can put in the record what that
15 witness was going to say on the issue of willfulness. And if
16 the jury comes back with a verdict for plaintiff, I'll consider
17 it. If the jury comes back with a verdict for defendant, then
18 that just all becomes moot.

19 The other way to do it too is with the deposition
20 transcripts. I know we have a lot of deposition transcripts.
21 Some of that testimony relates only, I think, to willfulness or
22 knowing issues.

23 Now, you do not need to read a deposition transcript
24 out loud to me. So I would ask the parties to tell me which
25 page and line numbers they would like me to read and consider

1 as I make the decision on willfulness or knowingly. And if a
2 particular piece of the deposition transcript is relevant only
3 to willful or knowingly, those issues, and we are not reading
4 it to the jury, then you call my attention to it, and I will
5 read that and, of course, listen to arguments before making a
6 final decision.

7 My expectation would be that if the jury does find
8 some liability for plaintiff, whether it be plaintiff
9 individually or in a class-wide basis, I'll then make sure that
10 I hear from the parties what is the universe of evidence that
11 has been submitted that I should consider in making my decision
12 on willfulness or knowingly.

13 I probably would even then give you an opportunity to
14 make a further closing argument on that question. Whether you
15 want to do it orally or in writing, I'll hear your positions on
16 that. Then I will make an appropriate decision in writing, of
17 course, having found and issuing written findings of fact and
18 conclusions of law on that question.

19 MR. O'NEAL: Would you indulge me on two more
20 questions, Judge?

21 THE COURT: I'll indulge you with whatever you want
22 until five o'clock.

23 MR. O'NEAL: What about a -- let's call it
24 Phase I/Phase II -- listening to the evidence that comes in
25 during the course of the trial or that's submitted to you and

1 then Phase II in which additional evidence is presented to you,
2 obviously following a decision made by the jury, which goes
3 further to the issue of whether it is willful or not.

4 THE COURT: I would ask plaintiff's their position on
5 that. If plaintiff has no objection, that's fine with me. If
6 plaintiff does have an objection and feels prejudiced, I would
7 listen to their argument.

8 MR. O'NEAL: Last question: What about an advisory
9 jury verdict?

10 THE COURT: No thank you.

11 MR. O'NEAL: Those are the only questions I have,
12 Judge.

13 THE COURT: All right. Mr. Franzini, did you want to
14 say anything on this point?

15 As I said, it is a strong tentative conclusion that
16 willfulness and knowingly goes to the Court, not the jury.

17 Do you want to be heard on this?

18 MR. FRANZINI: No, Your Honor. We don't have a
19 problem with that procedure. I just want to be sure that there
20 is no appeal issues created from that so --

21 THE COURT: Well, the only appeal issue is if I'm
22 wrong. And whoever is on the losing side of my ruling says
23 they have a Seventh Amendment right to a jury on that issue,
24 well, I will be shocked if I lose on that point, but that is
25 the appeal issue that I see.

1 MR. FRANZINI: Yes, Your Honor. This hasn't been
2 briefed, so I haven't had an opportunity to take a look at
3 this.

4 THE COURT: Okay.

5 MR. FRANZINI: I guess I would reserve a right to
6 object to this based on coming to a different conclusion after
7 reviewing the record.

8 THE COURT: That's fine. And if you want me to
9 change my mind in a timely fashion, get me your briefing and
10 your argument for why it belongs to a jury no later than this
11 Friday at 5:00 p.m. because I'm going to be telling the jury
12 next week what they have to decide.

13 MR. FRANZINI: Yes, Your Honor. Thank you.

14 THE COURT: All right. So let us proceed for the
15 rest of today on the assumption that the willfulness and
16 knowingly issues are only for the Court. There will not be an
17 advisory jury. If evidence is strictly and solely related to
18 that issue, it may not be presented to the jury. And with that
19 in mind, let's talk about your motions in limine in that
20 context.

21 In plaintiff's motions in limine first, the question
22 of whether -- it is the issue of whether ViSalus knew the
23 requirements of the TCPA or misunderstood the requirements.
24 Plaintiff moves in limine to exclude that, essentially arguing
25 that's irrelevant. Defendant seems to argue, well, it is

1 relevant to the issue of willfulness or knowing. I think it
2 probably is relevant to the issue of willfulness or knowledge.
3 Therefore, I'm going to grant the motion in limine in part and
4 say that the jury cannot hear any evidence of whether ViSalus
5 knew the requirements of the TCPA or misunderstood the
6 requirements, but I'll place no limits at all on defendant
7 presenting that evidence to me outside the presence of the
8 jury.

9 Does anybody want to be heard on that tentative
10 ruling?

11 MR. ADAMS: Not from the plaintiff's side,
12 Your Honor.

13 MR. FOSTER: Not for the defendant's side,
14 Your Honor.

15 THE COURT: Second, the plaintiff moves in limine
16 regarding the amount of statutory damages for violations of the
17 relevant sections of the TCPA, artificial or prerecorded voice.
18 Defendant does not oppose that motion, so it's granted.

19 The third motion in limine, the plaintiff moves to
20 exclude evidence relating to whether there was a prior express
21 consent. As I understand it, the defendant agrees that it is
22 not going to present evidence of prior express consent to the
23 jury. To the extent that may be relevant to me, when I decide
24 willfulness, you can either present it, or we can argue about
25 it later. But I'm going to grant it to the extent that

1 evidence doesn't go to the jury.

2 Does anybody want to be heard on the issue?

3 MR. ADAMS: Not from the plaintiff, Your Honor.

4 MR. FOSTER: Not from the defendant, Your Honor.

5 THE COURT: Fourth motion in limine, retroactive
6 waiver -- that's an interesting point -- but I think it goes
7 straight to the question of willfulness or knowledge. Again,
8 nothing goes to the jury on that question. My best guess right
9 now is you will be able to present that to me when I hear
10 evidence about willfulness and knowledge, and not to the jury.

11 Does anybody want to be heard on the fourth motion in
12 limine?

13 MR. ADAMS: No, Your Honor.

14 MR. FOSTER: Nothing from the defendant.

15 THE COURT: Fifth motion in limine, ViSalus's
16 financial condition. I just don't see how that's at all
17 relevant to the questions before the jury. There is an
18 interesting split in the circuits -- a split in the country --
19 as to whether or not the treble damages provision is
20 compensatory or punitive. If it is punitive, then financial
21 conditions are relevant. If it is compensatory, they probably
22 aren't. It is an interesting question. I have some tentative
23 thoughts. It is not worth formalizing right now. Since that
24 issue only goes to the issue of treble damages, no evidence of
25 ViSalus's financial condition may be presented to the jury.

1 I'm not going to be unduly swayed by sympathy one way or the
2 other. So if you want to present it to me outside the presence
3 of the jury for treble damage purposes, fine.

4 Does plaintiff want to be heard on that?

5 MR. FRANZINI: No, Your Honor.

6 THE COURT: Defendant?

7 MR. O'NEAL: Just one point, Judge. Since we are
8 lobbying interesting points, also in connection with this, you
9 may have run across multiple cases talking about how in cases
10 such as this, in particular TCPA, that the imposition of a
11 large amount of damages by using the statutory multiple
12 violates due process --

13 THE COURT: Oh, absolutely.

14 MR. O'NEAL: -- when compared against the financial
15 condition of a defendant.

16 So my expectation, Judge, since I think I see where
17 you are going on this, that would be part of the overall
18 determination of whether or not treble damages should be
19 awarded, and the final verdict, whether it should be up or down
20 based on all of those factors.

21 THE COURT: And you'll have an opportunity, if we get
22 to that portion of it, to make your arguments, submit your
23 evidence, make your legal arguments as to whether I should
24 increase damages up to three times, and if so, how much and
25 what its legal effect might be. All of that is preserved.

1 MR. O'NEAL: Thank you, Judge.

2 THE COURT: All right. I think that takes care --
3 plaintiff's sixth motion in limine, class counsel fees. It is
4 not opposed by defendant. It is granted.

5 MR. O'NEAL: The only question, Judge, and I'm not
6 even sure it is going to come up, is we may ask the plaintiff
7 on cross-examination whether she has any expectation of
8 financial remuneration as a result of this case. If the answer
9 is no, then that may be the end of it. On the other hand, if
10 the answer is yes, that may drift into other areas. So I'm not
11 saying it is going to happen, Judge, but I wanted to make a
12 note.

13 THE COURT: Any objection to that from the plaintiff?

14 MR. FRANZINI: I guess my concern is if opposing
15 counsel is intending to elicit from our client that the
16 statutory amount of the TCPA violation is \$500, that would run
17 afoul of our other motion in limine.

18 THE COURT: If we start with the premise that if any
19 witness has a financial interest in the outcome, that obviously
20 is fair game for bias.

21 So with that as a framework, let me ask Mr. Franzini
22 or any plaintiff's counsel, what would be an appropriate way in
23 your view for the defendant to elicit from the plaintiff
24 whether she has a financial interest in the outcome of the case
25 in order to present evidence of potential bias?

1 MR. FRANZINI: Well, Your Honor, I think they could
2 ask the question that counsel said, which is, do you expect to
3 recover along with the class? I think if you go into the
4 amount, that runs into the motion in limine.

5 THE COURT: Defendant's position? By the way, I
6 know -- let me rephrase that.

7 I will not let you get before the jury the fact that
8 there is a \$500 statutory minimum per violation. So take that
9 as a given.

10 What do you think is the right way for you to ask the
11 question to the plaintiff, if you want to try to show a
12 financial interest, as part of the argument, applies?

13 MR. O'NEAL: I am thinking of the draft outline I
14 have got running already, Judge. I could see a couple of
15 questions, which is -- let's say I ask it in a leading manner
16 the way I am supposed to. "How much do you expect to make from
17 this case? Do you have any hope or anticipation of getting any
18 money from anyone as a result of what happens here?" Those
19 types of things.

20 THE COURT: Well, if you asked, "How much do you
21 expect to get from this case?" Well, let me ask her lawyer.
22 What do you expect her answer will be?

23 MR. JACOBSON: Your Honor, I will be doing
24 Ms. Wakefield's direct, I expect her answer would be, "I don't
25 know," but I'm not sure about that. I'm concerned that the

1 answer might be "maybe \$500," or it may be something else.

2 THE COURT: If she does expect, let's say, to get
3 \$500 if she wins, shouldn't the jury be allowed to hear that in
4 order to evaluate whether or not the prospect of getting \$500
5 if she wins may affect the credibility of her testimony or
6 their evaluation of her credibility?

7 MR. JACOBSON: I think no, Your Honor, and one reason
8 is Rule 403. You have to weigh the minimal relevance to
9 credibility, 500 bucks, the reason Your Honor granted that MIL,
10 if this jury finds out it is \$500 per class member, that is
11 going to be very meaningful to them and very likely to
12 prejudice us.

13 THE COURT: All right. Can you assure me in the
14 absence of a settlement -- I'm not going to talk about
15 settlement issues -- but in the absence of a settlement that
16 plaintiff will get no more than \$500 per call?

17 MR. JACOBSON: Your Honor, is there a specific way of
18 her getting money that you're concerned about? I'm not sure of
19 any way she would get more than \$500 per call.

20 THE COURT: Well, I want to know if she is getting
21 some type of -- if she has been promised by class counsel some
22 promise for taking on the responsibility, and, frankly, the
23 financial potential responsibility of being a class rep. It is
24 not easy to be a class rep.

25 MR. JACOBSON: No, Your Honor.

1 THE COURT: So she has not been promised anything
2 beyond her share as a class member?

3 MR. JACOBSON: That's correct.

4 THE COURT: Do we know right now -- and I'm sure you
5 do -- how many calls is she going to say she received?

6 MR. JACOBSON: Five calls, Your Honor.

7 THE COURT: So we know that in theory she could get
8 her share, putting aside class counsel fees, \$2,500, but if it
9 is trebled, she could get as much as \$7,500, right?

10 MR. JACOBSON: If it's trebled, yes.

11 THE COURT: So that's at least a possibility. I
12 probably would be willing to say under a 403 analysis that \$500
13 is too small to be probative of credibility. I don't think I
14 can say that for \$7,500.

15 MR. JACOBSON: One thought to add on the 7,500. It
16 is very speculative that it will be trebled. We just don't
17 know the answer. That's relevant to her expectations and the
18 impact it has on bias.

19 THE COURT: Putting aside the question of bias and
20 the jury, if we just had a bench trial here, it would be no big
21 deal if she were asked, "You're hoping to get at least \$2,500,
22 and if all goes well, you might even get 7,500; isn't that
23 correct?" She will say, "Yes," I assume.

24 MR. JACOBSON: Your Honor, I will assume she will
25 say, "I don't know," and then suddenly we have thrown that

1 skunk out there in the jury box, and we didn't even get a
2 couple of cross questions.

3 THE COURT: Here is another way we can do it: I can
4 find outside the presence of the jury how she will answer that
5 question. Then I'll listen to both sides of your arguments.
6 If her answer is going to be "I don't know," and then the
7 defendant can probably follow up with, "Do you have new idea,
8 or any ballpark?" And if she says no or if she says \$500, I
9 would probably rule that that's de minimis and not sufficiently
10 probative; and therefore, it is excluded under 403. If she
11 says, "Gosh, I hope I could get as much as \$7,500," that may
12 come out. I probably would not let anybody explain how that
13 got calculated, but we will have to see.

14 All right. We may have to address this issue outside
15 the presence of the jury because I need to weigh the probative
16 value of the remuneration as it affects her credibility against
17 the risk of unfair prejudice to plaintiff.

18 MR. JACOBSON: Understood, Your Honor.

19 THE COURT: All right. We will defer that one.

20 All right. That takes care of the plaintiff's
21 motions in limine.

22 Mary, do we have a 3:00 or 3:30?

23 THE CLERK: We do.

24 THE COURT: What time?

25 THE CLERK: 3:30.

1 THE COURT: For your planning purposes, I have a
2 criminal matter that will take, I believe, less than ten
3 minutes at 3:30, and I do need to give our reporter a break.

4 Dennis, do you want it before or after the 3:30?

5 THE COURT REPORTER: After.

6 THE COURT: Okay. I will see counsel coming in at
7 3:30, and then maybe take a 15 or 20-minute break for you all.

8 MR. O'NEAL: Judge, should we clear our stuff out to
9 make room for counsel?

10 THE COURT: Mary, do we have someone in custody?

11 THE CLERK: We do.

12 THE COURT: We can put him on that table.

13 Now let's turn to defendant's motions in limine.

14 Defendant moves that no one should refer to ViSalus's
15 operations as either a pyramid scheme or refer to ViSalus's
16 compensation structure. I'm fine with ordering that no party
17 may refer to ViSalus as a pyramid scheme. However, I do note
18 in ViSalus's own materials and their own briefing they refer to
19 themselves as a multilevel direct marketing company. So I
20 assume plaintiff can refer to ViSalus as a multilevel direct
21 marketing company, correct?

22 MR. O'NEAL: Correct.

23 THE COURT: So no "pyramid scheme." Don't use those
24 words.

25 What's the issue on ViSalus's compensation structure?

1 Does plaintiff want to be able to explore ViSalus's
2 compensation structure, and if so, how is that relevant?

3 MR. JACOBSON: Your Honor, I will address what we
4 want to be able to say and explain why it is relevant. We just
5 need to be able to explain who these class members are and what
6 their relationship was to ViSalus. They were promoters. They
7 went inactive. And the reason ViSalus was calling them was
8 trying to get them to come back and sell ViSalus's products,
9 and to do that, ViSalus made telemarketing calls where it
10 offered them discounts and other rewards. We don't plan to
11 explore in depth ViSalus's compensation structure, but the jury
12 needs to understand how the business works to understand who
13 this class is.

14 THE COURT: You are not planning on getting into any
15 issues about if a class member brings in other people, then
16 that class member might also be able to get some additional
17 compensation by bringing in more people?

18 MR. JACOBSON: We need to touch on that to explain
19 how Ms. Wakefield got involved. Her mother connected her. She
20 joined to help her mother, because she understood her mother
21 would get some money. It is going to be one quick question.
22 We are not going to dwell on that.

23 Your Honor, I don't think ViSalus has identified any
24 inflammatory prejudice. It is just how the business worked.

25 MR. O'NEAL: Judge, I am sorry. I wasn't

1 understanding what you were just saying with the connection
2 with mother, the mother promised money.

3 THE COURT: I think what we are going to hear is that
4 Ms. Wakefield, the class rep, got involved because her mother
5 was a promoter. Ms. Wakefield -- the class rep realized that,
6 not only did she get involved she might have some opportunity
7 to have some earning herself, but that getting involved would
8 be an advantage to her mother.

9 Any objection?

10 MR. O'NEAL: No.

11 THE COURT: All right. Then we can do that.

12 All right. So granted in part; denied in part. No
13 use of the words "pyramid scheme," and things like that.

14 All right. Defendant's second motion in limine is
15 that neither the plaintiff nor her husband can refer to any of
16 their dissatisfaction with ViSalus's products, services, or
17 opportunities.

18 Does plaintiff need to get into that, and if so, what
19 is it relevant to?

20 MR. JACOBSON: Your Honor, with Ms. Wakefield, we
21 need to be able to tell her story. We need to explain that she
22 was a ViSalus promoter and briefly explain why she quit, and
23 the reason she quit is because she tried the products, and they
24 didn't work for her. They didn't work for her friends. She
25 didn't make money, and so she quit. That's it, Your Honor. We

1 are not going to dwell for 30 minutes on how terrible ViSalus's
2 products are or how awful their services are. We just need to
3 tell a coherent story with Ms. Wakefield. There's nothing
4 inflammatory or prejudicial about that. In fact, stopping us
5 from doing that, Ms. Wakefield's story doesn't make sense, and
6 it would prejudice us.

7 THE COURT: Sure. Response by the defendant.

8 MR. O'NEAL: If that's all that it is going to be
9 limited to, and I'm not going to hear "ViSalus sucks" and "I
10 hated it," and everything else, then I don't see a problem,
11 particularly if it is part of a narrative.

12 I will tell you, Judge, that the motion in limine was
13 borne out of -- part of the filings in this case were like
14 multiple consumer complaints about how bad our client was. We
15 weren't quite sure where the plaintiff was going to be taking
16 that.

17 THE COURT: All right. I think we have a resolution
18 on that. It is granted in part, but plaintiff will have leeway
19 to tell plaintiff's story without unreasonably and excessively
20 throwing dirt on the defendant.

21 Defendant's third motion in limine, other consumer
22 complaints. I just don't see how that is relevant to anything.
23 Am I wrong?

24 MR. JACOBSON: Your Honor, we have one consumer
25 complaint that is not only relevant to willfulness, it is

1 relevant to show that ViSalus was delivering prerecorded
2 messages that went on people's voice mails, which is a disputed
3 issue in this case.

4 I can pull up that exhibit and address it.

5 THE COURT: Why don't you do that. Obviously I'm
6 going to let you show that they delivered a prerecorded
7 message, but I don't see why we have to get into a consumer
8 complaint.

9 By the way, to the extent consumer complaints may be
10 relevant to willfulness, that's fine. I'm not going to worry
11 about that.

12 MR. JACOBSON: Understood, Your Honor.

13 THE COURT: Which exhibit should I look at, or is
14 this an audio?

15 MR. JACOBSON: This is visual.

16 THE COURT: What exhibit should I look at?

17 MR. JACOBSON: I believe I'm looking for P45.

18 THE COURT: Okay. I have 45 in front of me. P45 is
19 a two-page email. Where is the portion?

20 MR. JACOBSON: Your Honor, I have pulled P45 up on
21 the screen here. What this is is an email from ViSalus's chief
22 legal officer, Adam Morgan, to ViSalus's compliance analyst,
23 Mr. Scott Gidley. The subject is "Better Business Bureau
24 complaint," and I will explain how this is relevant to the
25 factual issues.

1 THE COURT: One second.

2 MR. JACOBSON: I apologize, Your Honor. It's P47.

3 THE COURT: All right. I have P47. The subject,
4 "BBB complaint."

5 All right. I'm looking. So where is the relevant
6 portion of this?

7 MR. JACOBSON: The relevant portion begins on page 2,
8 Your Honor. You'll see in this email chain that we have an
9 email from Mr. Gidley, ViSalus's compliance analyst, to its
10 chief legal officer.

11 What he says in this email is that he looked into
12 this Better Business Bureau complaint, and he just confirmed
13 that two messages were left on her answering machine as part of
14 the WinBack complaint. This is a class member being
15 investigated --

16 THE COURT: Show me where is that. I see Gidley to
17 Morgan; January 26th at 4:45.

18 MR. JACOBSON: Kelly Dickens and Kelly Ryan.

19 THE COURT: I see. When it was automatically
20 downgraded from a promoter account. Where is the relevant
21 information? I am missing that.

22 MR. JACOBSON: Your Honor, do you see --

23 THE COURT: I see, yes.

24 MR. JACOBSON: "Just confirmed that two messages were
25 left on her answering machine." ViSalus concedes in this case

1 that it delivered prerecorded messages to answering machines.
2 This is an investigation of ViSalus's own 30(b)(6)
3 representative did, who looked in this complaint, and he
4 confirmed that this class member got two messages left on her
5 answering machine.

6 Your Honor, you see it says part of the WinBack
7 campaign. That's the campaign where ViSalus was trying to win
8 back promoters.

9 THE COURT: Is the "her" referring to Kelly Ryan or
10 Kelly Dickens. Oh, I see. It says, "Customer has two
11 accounts." Got it.

12 Let me ask you this question: In terms of the
13 relevant information that you want to present, wouldn't it be
14 sufficient to show nothing on page 1 -- basically redact or
15 eliminate 47-1. Then on 47-2 redacting the words "BBB
16 complaint" in the subject lines and redacting the line that
17 says "original complaint filed." Frankly, redacting those
18 first three lines: "Original complaint filed; first
19 notification from BBB; second notification from BBB."

20 If we redact all of that and we redact the subject,
21 you can then present that on January 26th, 2016, Scott Gidley
22 was telling Adam Morgan and CC'ing Josh Berger that he
23 investigated and that the customer has two accounts and that
24 Gidley just confirmed that two messages were left on her
25 answering machine as part of the WinBack campaign, et cetera,

1 et cetera, through the rest of page 2.

2 Wouldn't that be sufficient to present the relevant
3 portion of this document to the jury?

4 MR. JACOBSON: Your Honor, if I may address that
5 piece-by-piece starting with the first email on page 1. I
6 agree with Your Honor that we can do without that.

7 THE COURT: All right.

8 MR. JACOBSON: My concern about redacting the "BBB
9 complaint" information and the information about a complaint
10 from page 2, it is not going to make any sense to the jury why
11 Mr. Gidley investigated.

12 THE COURT: What difference does it make? There was
13 an issue. He investigated it. He confirmed that there were
14 two messages left on this customer's answering machine as part
15 of the WinBack campaign. What more do you need? Why does the
16 jury need to know why he was investigating something?

17 MR. JACOBSON: Your Honor, if we redact "BBB
18 complaint" and we redact any reference to complaint -- let me
19 take a step back, Your Honor.

20 THE COURT: In other words, they are not really
21 bullet points; they are dashes. But in the second email, the
22 4:45 p.m., I think if you redact the first three lines that
23 begins "original complaint, first notification, second
24 notification" and "re" -- just redact the words "BBB
25 complaint." You can put "re phone call." Of course, redact

1 "BBB complaint" in the subject line at the top of the email.

2 We see that -- frankly, that's February 4th. That
3 came later. You don't even need that top email.

4 MR. JACOBSON: Your Honor, this is an important email
5 in this chain. We can do without the top email. We don't need
6 that. But if you see the second email in the chain on page 1,
7 it says, "Ms. Dickens was contacted twice in December regarding
8 a WinBack promotion," that's relevant.

9 THE COURT: Okay.

10 MR. JACOBSON: So we need that. If we could use that
11 email and the email on the next page, the same thing, saying he
12 confirmed it, then Your Honor we can do without the "complaint"
13 language.

14 THE COURT: Okay. I see that. So we will take the
15 words "BBB complaint" out of every subject line. Frankly, the
16 rest of it isn't a problem. We will take the three lines that
17 I referenced, "original complaint, first notification from BBB,
18 second notification from BBB." In other words, every time you
19 see the word "complaint," it is gone. Every time we see the
20 letters "BBB," it is gone. Then it looks like the rest is
21 probably okay. You can live with that, right?

22 MR. JACOBSON: Your Honor, we think we should be able
23 to present "complaint," but we can live with it.

24 THE COURT: Got it.

25 And if we redact the document as I just described,

1 any further objections from the defendant?

2 MR. O'NEAL: Are we speaking about admissibility of
3 this document now, Judge?

4 THE COURT: No. We are talking about just the motion
5 of limine talking about customers' complaints.

6 MR. O'NEAL: Is your intention also to take out the
7 line that says that there is no record that she called back for
8 messages. However, her phone number is on our DNC list. They
9 dropped the "Do Not Call" claim.

10 THE COURT: Good point. I think we need to redact
11 that line, "Her phone number was placed on the DNC." Any
12 reference to DNC needs to go back. It is an irrelevant issue
13 that they are calling someone on a "Do Not Call" list.

14 MR. JACOBSON: Understood, Your Honor.

15 THE COURT: All right. Looking strictly at the
16 motion in limine on customer complaints, I take it that
17 defendant has no further arguments on 47, as redacted, as I've
18 just described, but we are not talking admissibility.

19 MR. O'NEAL: As I understand what the plaintiff's
20 position is, the only document that could fall into the
21 category of customer complaints that they plan to try to get
22 admitted is Exhibit 47. Subject to what you said, I'm fine
23 with what Your Honor has done, reserving the right to object to
24 the exhibit itself.

25 THE COURT: Sure. Do you agree with that comment,

1 Mr. Jacobson?

2 MR. JACOBSON: Your Honor, I would like the
3 opportunity to address 45 because I believe there is some
4 non-willfulness related.

5 THE COURT: We are done with 47. I would like to see
6 an amended 47. You don't have to call it 47A. But when you
7 redact 47, just give me a new substituted 47, please. Make
8 sure you get Mary the revised electronic version for the jury
9 in case it does get admitted.

10 Okay. You wanted to talk about 45. You may.

11 MR. JACOBSON: Briefly, Your Honor, please.

12 THE COURT: You may.

13 MR. JACOBSON: 45 is an email from the ViSalus's
14 compliance department to Mr. Gidley, the 30(b)(6)
15 representative. In this email they forward a number of
16 complaints from a former ViSalus promoter to ViSalus. These
17 are complaints directly to ViSalus, and these complaints are
18 specifically about ViSalus delivering a prerecorded messages.

19 THE COURT: Show me where I should look. Where do I
20 find all this?

21 MR. JACOBSON: One example, Your Honor, if you look
22 on page 1, you see the second email is from Bree Schappert.

23 THE COURT: Yes.

24 MR. JACOBSON: Then you see the second sentence in
25 the email says, "Why do you insist on harassing me with daily

1 recorded phone calls" --

2 THE COURT: Yeah.

3 MR. JACOBSON: -- "including a five-minute long voice
4 mail?" Each of these complaints that she has forwarded to
5 ViSalus over time. For example, in the next email down, she
6 says, "I get a five-minute-long voice mail on my machine every
7 time you call." If we then flip to page 2, Your Honor, we see
8 some earlier complaints from her to ViSalus where she says, "I
9 just got another recorded call." Then in the last email on
10 page 2, "I'm still being harassed with multiple recorded phone
11 calls from ViSalus."

12 So the relevance here is not about willfulness,
13 although it is relevant to that too. It is also relevant to
14 show that ViSalus was making recorded calls.

15 THE COURT: Let me ask you this -- I totally get the
16 relevance to willfulness. That's not a problem. I will
17 receive it for willfulness, assuming it is otherwise
18 admissible.

19 This is a statement from Bree Schappert. How is that
20 going to be admissible?

21 MR. JACOBSON: Your Honor, it could be offered for
22 the truth of the matter asserted under two different hearsay
23 exceptions. The first is it's present sense impression.
24 Your Honor, in her emails -- here is an example on page 2, if
25 you look at her first email on page 2. She says, "Just got yet

1 another recorded call." She is getting these calls and
2 immediately typing this email out to ViSalus describing what
3 has happened to her. That meets the present sense impression.

4 It also meets the second exception, Your Honor,
5 excited utterance. From the context of these emails it is
6 clear she was extremely upset and stressed out about these
7 calls. For example, in this email we are looking, she says,
8 "Seriously," and puts like eight question marks on it. She is
9 under the stress of the moment, and the hearsay rules find that
10 under the circumstances it is reliable and can be admitted for
11 the truth of the matter asserted.

12 Your Honor, I would add one more argument to that.
13 If you look at the top email from ViSalus where ViSalus
14 compliance responds to Mr. Gidley, ViSalus doesn't say,
15 "Ms. Schappert is wrong; she didn't get recorded messages.
16 This is not reliable." They just ask her to provide her phone
17 number. She just sent another email. They deny this fact.
18 They implicitly adopted that she is right about this.

19 THE COURT: So your two hearsay exceptions are
20 present sense impression and excited utterance.

21 MR. JACOBSON: Your Honor, I would also add that this
22 would be adopted by ViSalus that what she said was true. It
23 would fall in under the admission by party-opponent exclusion
24 as well.

25 THE COURT: All right. Defendant's position.

1 MR. O'NEAL: Judge, are we talking about the
2 admissibility of this exhibit, or are just narrowing it down?

3 THE COURT: Yes. Let's talk about admissibility.

4 MR. O'NEAL: First of all, Judge, this isn't a class
5 member, and the phone number here is Canadian. So I'm not
6 really quite sure why we are even referencing it. I think you
7 can take judicial notice that 204 is the area code for
8 Manitoba.

9 Moreover, Judge, there is no foundation for this.
10 Everything that counsel just said was counsel's testimony.
11 There is not a lick of, "Oh, and did you agree with it? Did
12 you adopt it? Is this part of your business records," anything
13 that like that. All we have, Judge, is a document exchanging
14 some comments about a Canadian who isn't even part of the
15 class.

16 Then we get to the prejudicial stuff, Judge. The
17 reason why they want that -- this is exactly the reason we
18 brought the motion in limine -- to prevent the jury from being
19 inflamed and prejudiced by customers who are pissed off at my
20 client. So for all those reasons, Judge, and I actually should
21 also add, as I look at it, this isn't a present sense
22 impression of, "Oh, my God, he just got shot," or something
23 like that. This is somebody who just is angry taking the time
24 to hit the numbers on the keyboard, then pressing and sending.

25 THE COURT: By the way, I think it is kind of

1 probably present sense and/or excited utterance. But I'm
2 intrigued by the argument that if it is not a class member,
3 it's irrelevant. Is Bree Schappert, whose email address has a
4 Canadian suffix .ca, is she a class member?

5 MR. JACOBSON: Your Honor, I would have to check. It
6 sounds like she may be not, but it is still relevant.

7 THE COURT: Why?

8 MR. JACOBSON: Evidence is relevant if it has any
9 tendency to prove a material fact. This proves that ViSalus's
10 POM machine system was delivering prerecorded messages and
11 delivering frequently.

12 THE COURT: How do we know this came from the POM
13 machine?

14 MR. JACOBSON: ViSalus has stipulated that this
15 program is the POM machine, where recorded messages --

16 MR. O'NEAL: To be clear, Judge, we have not
17 stipulated that what is being referred to here was delivered by
18 POM. We haven't said anything about this exhibit. We haven't
19 asked any questions, no interrogatories, no requests for
20 admission. Nothing.

21 THE COURT: How would you lay the foundation that
22 this call to this non-class member came from the POM machine?

23 MR. JACOBSON: Your Honor, we do have a stipulation
24 from ViSalus that says that the two types of prerecorded calls
25 were placed through POM, Voice Casting calls and Press One

1 calls. We also have the time period is relevant. When she is
2 sending these in 2013 is our class time period when ViSalus was
3 using the POM machine.

4 Also, Your Honor, we have evidence that the reason
5 that ViSalus was calling these promoters was trying to get them
6 to come back to ViSalus. If you look at these emails,
7 Ms. Schappert says, "I quit long ago. I don't want to come
8 back." This is consistent with it being a WinBack campaign and
9 also ViSalus's witness runs through POM.

10 THE COURT: I want to think about 45 a little bit
11 more.

12 It sounds like all we have on the complaints are 47,
13 with some redactions as we have described, and there will be no
14 more objection to 47.

15 45, there is an objection to admissibility. There is
16 an admissibility under 403. We will talk about it some more.

17 MR. JACOBSON: Yes, Your Honor.

18 THE COURT: I will think about 45 some more.
19 Interesting.

20 All right. Let's see if we can get through these
21 motions in limine. That addressed motion in limine No. 3.

22 47 will be redacted.

23 45, ruling reserved.

24 Defendant's motion in limine No. 4, Group Cast.

25 Plaintiff doesn't oppose redacting or omitting all references

1 to the word "Group Cast."

2 By the way, what's Group Cast?

3 MR. O'NEAL: What is Group Cast? Group Cast, Judge,
4 is basically an Internet "join on the call," and then we will
5 cast out a message to all the people on your email. Come and
6 talk -- join the email conference.

7 THE COURT: Okay. So plaintiff doesn't oppose that
8 motion, so defendant's fourth motion in limine is granted.
9 Plaintiff may not present any evidence, documents that refers
10 to Group Cast.

11 Defendant's fifth motion in limine, among other
12 things, they don't want the auto dialer issues.

13 Auto dialer is not in this case, correct?

14 MR. O'NEAL: There is no claim that the use of the
15 auto dialer violated a statute.

16 THE COURT: Right.

17 So you want to ensure that the plaintiff does not
18 refer to things like "auto dialing" or the "auto dialer"
19 provisions. I take it that plaintiff doesn't disagree with
20 that.

21 By the way, you are welcome to stand at your desk or
22 sit at your desk, whatever you want. You don't have to keep
23 popping up back there. It is up to you.

24 MR. FRANZINI: I am used to getting up, Your Honor.
25 I will sit here.

1 I think there are two issues here with auto dialer.
2 We are not going to suggest that ViSalus is violating the auto
3 dialer provisions of the TCPA. The jury doesn't have jury
4 instructions on that or anything like that.

5 However, ViSalus is violating the recorded voice
6 section of the TCPA using an auto dialer called the POM machine
7 or POM. The POM machine is what allows it to make these calls.
8 So we need to be able to explain to the jury how ViSalus is
9 making all these calls and why it makes sense for ViSalus to
10 use a recorded voice as opposed to a live agent.

11 THE COURT: Well, obviously I'm not going to let you
12 imply that ViSalus is violating the auto dialer portions of the
13 TCPA, but you are saying you are not going to make that
14 indication anyway.

15 What else do I need to worry about here?

16 MR. O'NEAL: The motion in limine, Judge, is
17 primarily designed not to inflame the passion of people
18 associated with robo dialing or robo calling, which is exactly
19 the statute that you are identifying; that this is a robo call
20 class, that kind of thing. So when I read their response to
21 the motion in limine, and it actually gave me pause to the fact
22 that that is exactly what they were trying to do. What they
23 are going to try to use is to inflame the concept of, "This is
24 an auto dialer, and you were calling millions of people without
25 thought," that kind of thing.

1 If all they are going to do is just say, "Progressive
2 Outreach Manager system," also known as POM, had the capability
3 by which the computer would dial numbers as opposed to having
4 somebody to manually type in digits, that's not a problem. It
5 is trying to get, "Everybody hates robo calls" is what the
6 motion in limine is targeted at.

7 THE COURT: So what is the technical definition of a
8 robo call?

9 MR. O'NEAL: There really isn't one. It is not in
10 the statute. It is just kind of bandied about as a term of
11 art. Candidly, over the last couple of months since I have
12 come into this case, I have found that everybody has a
13 different definition for it.

14 THE COURT: What I thought, and this was without
15 legal analysis or research. What I've always assumed, if it is
16 an artificial voice or a prerecorded voice, and so my phone
17 rings, and I'm not talking to a live human being, if it is not
18 live, it is a robo call. Am I wrong?

19 MR. O'NEAL: I don't know. Like whenever I've heard
20 robo call, what I've heard it referred to sometimes as a robo
21 call is when there is a robot or an automatic dialer is dialing
22 all the numbers. I have also heard robo class. It is one of
23 those things that everybody just grabs ahold of and uses in the
24 vernacular without really giving any precision to it.

25 THE COURT: This case is going to be about

1 allegations that a class was called using artificial voices or
2 prerecorded messages so that when the call rings, and I want to
3 say, "Excuse me; can you please stop calling me," I'm not
4 talking to a live human being. I'm talking then to a robot.

5 So I'm not going to grant the fifth motion in limine,
6 but I'm going to keep a close ear out to plaintiff, whether in
7 opening statement or anywhere else, misrepresents what this
8 case is about or misuses the term, I will certainly entertain
9 objections from defendant at that time.

10 All right. Before we break for my hearing in a
11 criminal matter, let me ask you this: I have gone through
12 defendant's objections to plaintiff's deposition designations,
13 and I can share with you my rulings on those when we come back.
14 They are pretty darn simple and pretty easy.

15 What are we going to do about plaintiff's objections
16 to defendant's deposition cross-designations? I didn't get
17 from plaintiff -- well, I got a lot more from plaintiff, and
18 some of them seem to be along the lines of things that probably
19 won't be presented by defendant if they go strictly to the
20 willfulness issue or lack of willfulness and lack of knowledge.
21 What will be an efficient way for me to rule on plaintiff's
22 exceptions?

23 Let me start from the beginning on this question.
24 Now that you know my ruling that nothing that relates only to
25 willfulness or knowingly is going to go to the jury, won't both

1 sides want to further refine and reduce their deposition
2 designations and cross-designations?

3 MR. ADAMS: Your Honor, the short answer is yes.

4 THE COURT: So what I think I need to do is give you
5 the time to process that ruling, go through your deposition
6 designations and cross-designations, take out anything that is
7 only related to willfulness or knowingly, confer with each
8 other, and then present to me a revised list of what do you
9 really still disagree about. Frankly, if you can do that by
10 Friday at 5:00, I'll work over the weekend, and I will get you
11 rulings by Monday and then you can be prepared for your trial
12 on Wednesday.

13 Will that work?

14 MR. ADAMS: Yes, Your Honor --

15 MR. O'NEAL: Yes.

16 MR. ADAMS: -- but there is another issue that we may
17 want to discuss, and it has to do with the order in which these
18 depositions will be read.

19 THE COURT: Right. We can talk about that when we
20 come back from the break, but I'll share with this you. If
21 there is a cross-designation -- here is how I generally
22 approach this problem: If there is a cross-designation that
23 immediately precedes or immediately follows a designated
24 portion, basically if there is some blue that immediately
25 precede or immediately follows a yellow, my general presumption

1 is that belongs to be read at the same time under the rule of
2 completeness.

3 One possible exception to that is if the designated
4 portion goes on and on and on and basically tries to dilute the
5 impact of the designated portion -- I'm not sure I saw that,
6 but you can call that to my attention.

7 If, however, a cross-designation is reasonably
8 distant from a designation, then my general presumption is it's
9 not required to read at the same time under the rule of
10 completeness, but that's a rebuttal presumption. So for
11 example, on page 2, the person says, "The light was red at the
12 time of the accident." Then on page 27 the person says, "Oh,
13 by the way, I made a mistake earlier on. I said the light was
14 red. I meant it was green." That has to be read at the same
15 time at the time we hear the light was red under the rule of
16 completeness, but that's a rare circumstance.

17 So maybe what you need to do is realize that if it is
18 closely connected -- right before/right after -- I'm going to
19 insist that that be read at the same time -- that the
20 cross-designation be read at the same time of the designated
21 portion.

22 If it is far distant or if it goes on for a really
23 long time, call that to my attention, and then my presumption
24 will be, no, the other side can read that in their
25 case-in-chief. That should be able to give you enough guidance

1 to be able to work that through, and for those very few
2 remaining objections and disagreement, call them to my
3 attention, and that's how I will work it through.

4 Does everybody understand what I'm talking about?

5 MR. ADAMS: Yes, Your Honor.

6 THE COURT: Okay. Let's take a recess now, 20
7 minutes for you. I'll take the next criminal matter if the
8 folks are ready, and then Dennis, we will get you a break.

9 (Recess.)

10 (Open court; proceedings resumed:)

11 THE COURT: All right. Welcome back.

12 So we talked a little bit about a process dealing
13 with deposition designation and cross-designations. There is
14 only one thing I really want to share with you that confused
15 me.

16 By the way, I do see that in Scott Gidley's 2016
17 deposition, the word "logarithm" has been corrected to
18 "algorithm." Page 36, line 2. There is no objection to that,
19 right? Okay.

20 And then on page 111, line 5, it appears that is
21 being correct to be read the answer is yes, correct? Nobody
22 has a problem with that; am I right? Okay.

23 On John Laun's deposition testimony, I was confused
24 about the following: If you turn to page 39 of John Laun's
25 testimony, page 39, lines 22 through page 40, line 5, I see

1 that defendant objects to that as irrelevant, but the version
2 that I have has it marked in blue, which means it is
3 defendant's designation.

4 What am I misunderstanding?

5 MR. O'NEAL: Let me read it, Judge. Could you repeat
6 the cite.

7 THE COURT: Sure. If you go to Docket 192,
8 defendant's objections to plaintiff's deposition designations.
9 That's Docket 192.

10 MR. O'NEAL: Right.

11 THE COURT: Now take a look at John Laun. It is on
12 page 3. The second entry, page 39, line 22 to page 40, line 5.
13 Defendant objects on the grounds of relevance. So I take a
14 look at that designation to see if it is relevant or not, and I
15 see it is marked in blue, which tells me that is a defendant
16 designation. What am I missing here?

17 MR. O'NEAL: Maybe it was my hand-fisted way of
18 trying to say it is irrelevant, but that if you allow the
19 plaintiff's designation, then I would add the additional
20 portion.

21 THE COURT: I'm totally baffled. I still don't
22 understand you, and here is why: The only thing you are saying
23 is irrelevant is page 39, line 22 to page 40, line 5, and that
24 consists of two questions and two answers. I'm totally fine
25 with taking out those two questions and two answers as

1 irrelevant.

2 So do you want them in or want them out?

3 MR. O'NEAL: I want them out.

4 THE COURT: You want them out?

5 MR. O'NEAL: Yes.

6 THE COURT: Okay. Then they are out.

7 If you want them out, I won't ask you why you
8 designated them blue to begin with, but the thought crossed my
9 mind to ask that, but I won't.

10 Okay. Let's talk about defendant's exhibits -- there
11 is only five of them -- and plaintiff's objections.

12 So we have defendant's trial exhibits. Plaintiff
13 objects to all of them. Now, given that willfulness and
14 knowingly only goes to the Court, not the jury, does the
15 defendant still want all five of those exhibits, 201, 202, 203,
16 204, and 205, or do any of them relate solely to willfully?

17 MR. O'NEAL: Accepting Your Honor's ruling, on 201,
18 we agree, based on that ruling, it could not be used with the
19 jury, but reserve the right to use it with you.

20 THE COURT: Of course. You don't even need to say
21 that. Right now I'm just not worried what you want to use with
22 me. My general attitude is you can use anything and everything
23 you want with me. Then when we get to closing arguments or
24 post-trial arguments on that issue, you can then make the
25 arguments that I shouldn't consider this or that, as I decide

1 willfully or knowingly.

2 MR. O'NEAL: With that, Judge, 201 fits that; 202
3 fits that; 203 fits that. 204 does not, Judge. I've marked
4 it, but I'm not sure I'm going to use it. But this, I believe,
5 is the computer history with respect to products which were
6 ordered by the plaintiff herself.

7 THE COURT: Okay.

8 MR. O'NEAL: And I think that's it, Judge.

9 THE COURT: What about 205? Do you still want 205
10 for the jury?

11 MR. O'NEAL: I'm sorry. Let me see -- let me think
12 about that for a minute, Judge, because I've got to absorb it
13 with the context of the withdrawal.

14 THE COURT: To be precise, Exhibits 201, 202, and 203
15 are being withdrawn as exhibits to be presented to the jury.
16 You are always welcome to offer them with me, and we will deal
17 with that. But they are not going to be offered to the jury,
18 so I don't need to worry about plaintiff's objections to those.

19 You may very well want to use 204 in front of the
20 jury.

21 So what is, if any, plaintiff's objection to 204?

22 MR. FRANZINI: Your Honor, we don't have a legible
23 copy of 204, so we can't tell what it is.

24 THE COURT: Well, let me ask your definition of
25 "legible."

1 Mary, would you show them mine. Is your copy
2 different than my copy?

3 (Pause in proceedings.)

4 MR. FRANZINI: I think it is, Your Honor.

5 THE COURT: Well, then defendant needs to start out
6 by explaining why you would have a different copy than I have.

7 MR. O'NEAL: It does appear that your copy is better,
8 Judge. It is better than mine. That must be the result of too
9 many copies being run. I apologize to opposing counsel. We
10 absolutely will get a clearer copy to him.

11 THE COURT: Very good. Let me give plaintiff's
12 counsel my copy for a few minutes, and then I'll ask you what's
13 your objection to it.

14 MR. FRANZINI: Thank you, Your Honor.

15 THE COURT: By the way, it is not my plan to preadmit
16 anything, but I do want to know if there are any objections.
17 What my plan would be is to either sustain the objection. I
18 might overrule the objection now, subject to appropriate
19 authentication or foundation. If there is no objection to a
20 document, then I would like to know that. Otherwise, if there
21 is an issue that may require foundation, I may say, "let's wait
22 and see it in trial context," if it is a relevance issue or
23 something like that.

24 Does plaintiff have an objection to 204?

25 MR. FRANZINI: Your Honor, I'm not sure what the

1 relevance is. It appears to be our client's order history. I
2 don't know how that's relevant to the case. I don't think it
3 has been authenticated. And to the extent it is being used for
4 the trust of the matter asserted, it is hearsay.

5 THE COURT: Well, it probably is a business record.
6 I'm not going to worry about that, if there is a foundation for
7 business record.

8 But I'm going to reserve ruling on 204. My guess,
9 what I'm hearing from defendant, if you are going to use it, it
10 will probably be in cross-examination of Ms. Wakefield; am I
11 right?

12 MR. O'NEAL: Yes, Your Honor.

13 THE COURT: So they can lay a foundation of whether
14 it is accurate; whether she received it from the defendant. If
15 they then want to offer it, and you want to object to
16 relevance, I'll ask defendant briefly how is it relevant, and
17 then I'll make an appropriate ruling.

18 Mary, can I have my copy back, please?

19 By the way, let me advise both sides now something I
20 feel very strongly about how I run my trials in front of a
21 jury.

22 I do not allow speaking objections. So if anybody
23 wants to make an objection, you stand up, and you can either
24 say, "Objection," or if you really want to, add one or two
25 words: Objection, relevance; objection, hearsay; objection,

1 lack of foundation, something like that.

2 If I don't understand your objection, I will invite
3 you to give me a few more words. I might very well then make a
4 ruling immediately sustaining or overruling, or I may turn to
5 the other side and say, "Brief response." Same rule applies.
6 Don't give me a long argument, especially don't try to get
7 words in in front of the jury. Give me a brief response to the
8 objection.

9 So if the objection is "objection, hearsay"; brief
10 response, "business record." If I need to hear more
11 foundation, I'll ask for it, or I may sustain it with leave to
12 lay a better foundation, but no speaking objections. I will
13 interrupt you and stop you and remind you in front of the jury
14 that I've said no speaking objections.

15 There is a possibility that I may invite counsel to
16 join me at sidebar. I step off the bench. I go over there.
17 Then we have a little discussion. It will be off the record,
18 so if anybody wants to put something on the record later, it
19 will be your responsibility to ask for that opportunity, and
20 I'll, of course, let you do it.

21 The reason why I do that is I like to make as best
22 use of the jury time as is all reasonable. So I do not send
23 the jury back to the jury room very often. It might happen
24 once in a trial, but I've had many trials where it didn't
25 happen at all. Some judges send juries back and forth, not me.

1 So we want to make as good and as efficient use of the jury's
2 time while they are here, and so we may have some sidebar
3 conferences.

4 All right. Enough said on that.

5 Have you figured out yet, Mr. O'Neal, whether or not
6 you want to preserve the possibility of presenting 205 to the
7 jury?

8 MR. O'NEAL: I am going to withdraw that request. I
9 will use it only with you, Judge, with respect to the issue of
10 willfulness.

11 THE COURT: All right. Then 205 is also withdrawn
12 from the jury's consideration. I don't need to worry about an
13 objection there.

14 All right. I think that takes care of the marked
15 exhibits at this time from the defendant.

16 Now, plaintiff has more than 63 exhibits. Frankly,
17 they had Exhibits 1 through 38. Then 38 is marked 38-1 through
18 38-405. Then we pick up with Exhibits 40, 40A, 41, 42, and 43.
19 43 is marked as 35 exhibits, 43-1 through 43-35. Then 44
20 through 63, with also another exhibit marked as 49-2. So there
21 are several hundred exhibits there.

22 Does the defendant know now -- can you tell me are
23 there any of those exhibits to which defendant has no
24 objection?

25 MR. O'NEAL: We don't have an objection, Judge, to

1 Exhibit No. 2, Sands, the verification.

2 THE COURT: What do you mean "Sands, the
3 verification"?

4 MR. O'NEAL: If you look at the first page, there is
5 a verification from a person from the company that produced the
6 records.

7 THE COURT: Oh, I see. So if you take out that first
8 page and start the exhibit sticker on what's now numbered 2-2,
9 you are telling me there is no objection to Exhibit 2?

10 MR. O'NEAL: Judge, now that I think about it,
11 because if it just comes in without the statement in paragraph
12 3A, it won't have any explanation as to what it is. So now
13 that I think about it, maybe the verification should stay in.
14 It may confuse them, but I think they need to have that
15 paragraph.

16 THE COURT: Okay. So you have no objection to
17 Exhibit 2?

18 MR. O'NEAL: Correct.

19 THE COURT: Any others?

20 MR. O'NEAL: No. 3, Judge, no objection, if we redact
21 out the third page of Exhibit No. 4.

22 THE COURT: That's 4-3?

23 MR. O'NEAL: Yeah. The reason why, Judge, there is a
24 clause that talks about "take back your telephone; say 'do not
25 call' to unwanted telemarketers." If that comes out, I'll let

1 go of my objections and agree it can come in. But if they want
2 to keep it in, then I'm going to reserve objections.

3 MR. JACOBSON: That's fine with us, Your Honor. We
4 can take out 4-3 if we keep the others.

5 THE COURT: All right. So 4-3 will be removed. Got
6 it.

7 Okay.

8 MR. O'NEAL: The information contained in 61,
9 Judge --

10 THE COURT: One second. So that means 5 through 60,
11 you do maintain your objections to?

12 MR. O'NEAL: Correct.

13 THE COURT: Let's go to 61. One moment. All right.
14 I'm at 61.

15 MR. O'NEAL: Well, it is odd in the sense that it is
16 an exchange of communications to and from counsel.

17 THE COURT: Oh, but I'm sure it was authorized
18 representatives.

19 MR. O'NEAL: Yeah. That's not the point. It looks
20 odd, again, to the jury. So no objection to 61, Judge.

21 THE COURT: All right.

22 MR. O'NEAL: And we maintain our objections for the
23 remainder of the exhibits.

24 THE COURT: All right. Give me one moment, please.

25 What's the problem with No. 1, the agreed-upon

1 statements? I know you moved to withdraw your stipulation. I
2 have denied that. You preserved that on the record. I will
3 let you have a continuing objection on that. But with that
4 objection overruled, why shouldn't the jury get No. 1?

5 MR. O'NEAL: Sure. So there are multiple things,
6 Judge. One, it's not complete because there were exhibits that
7 were supposed to be attached to the stipulation.

8 No. 2, if it comes in, we are not going to have the
9 ability to explain to the jury the context of what it is. All
10 right. It was done by the judge. There was a subsequent order
11 that said that you have to go back and redo it. It was
12 submitted. That order was never signed.

13 And perhaps more importantly, Judge, and this is
14 something that I was going to talk about later. Accepting
15 Your Honor's ruling, one of the things that I've seen in
16 particular that showed up in the reply for motion for
17 sanctions -- plaintiff has grabbed ahold of a couple of the
18 stipulations -- and what they've said, for example, if the language
19 says, "We used Voice Casting and a Press One campaign."

20 THE COURT: And a what?

21 MR. O'NEAL: A Press One campaign. A Press One
22 campaign -- again, it is in the vernacular. It is like, okay,
23 if you want to talk to an operator, press one, which in the
24 stipulation we said we've used, they've now gone beyond the
25 stipulation and said that stipulation says that every telephone

1 call that you make had to be a Press One or had to use Voice
2 Casting. That comes up with respect to two of the clauses that
3 are in there.

4 That's the issue. If the stipulation comes in or the
5 subsequent order, No. 1, I'm concerned that it is going to be
6 construed in a manner that it is not what it really says.

7 Then No. 2, if you actually let in the actual
8 exhibits, I don't know how I'm going to get in front of the
9 jury the context of how they were created and what they did,
10 which, Judge, I think I should be able to because that's fair.

11 THE COURT: Well, you have got a witness on the list.
12 Call your witness to explain it.

13 MR. O'NEAL: The witness would not know, Judge,
14 because like the lawyers would say, "I don't know. I haven't
15 seen it," dot, dot, dot, dot, dot.

16 THE COURT: I don't want the jury to look at things
17 like parties and venue and jurisdiction. That's just
18 irrelevant. I do think, though, as I put in my order, if the
19 parties stipulated to certain facts, and that prompted the
20 plaintiff to not take discovery on those facts or to ask for
21 requests for admissions because they have a stipulation, it is
22 not fair to the plaintiff to now deprive them of that.

23 MR. O'NEAL: To be clear, these stipulations were
24 entered after the close of discovery.

25 THE COURT: Okay. Still, when a stipulation is

1 entered into, then the other side should be able to rely on the
2 fact that this is a fact that is stipulated to, and if you are
3 not going to stipulate to it, they will have the right to ask
4 in a timely fashion for discovery to be reopened. But I don't
5 want it in this fashion to go to the jury.

6 Yes. Mr. Franzini.

7 MR. FRANZINI: Your Honor, if we can get a written
8 copy of the stipulations that the parties agree to, then we
9 don't need P1 and P63, the orders. So what we propose to do --
10 and I have papers I can hand up -- but to just submit -- to
11 have a piece of paper that has the stipulations on them that
12 says that these are the admitted facts or these are the
13 stipulations, or whatever we want to call them, and give that
14 to the jury so the jury has it. We can cross their witnesses,
15 if they bring one with it. But we don't need to have these
16 orders entered.

17 THE COURT: Right. I think that's the right way to
18 do it. You know, there's a model jury instruction where I
19 explain to the jury what a stipulation is.

20 Have you already shown that to the defendant?

21 MR. FRANZINI: I did send it to him, yes. I can give
22 him a paper copy now.

23 THE COURT: Let me know by Friday whether there are
24 any remaining objections.

25 But if the defendant says, "There should be an

1 exhibit attached to this," make sure there is an exhibit
2 attached, in all fairness. I noticed that some of these
3 stipulations refer to an exhibit. If that's necessary to
4 fairly understand what that stipulation means, and it is in the
5 stipulation that there is a reference to the exhibit, it
6 probably should be attached. If it really is not relevant to
7 anything, then you should be able to agree on the fact that it
8 is not relevant. If one side thinks it is relevant and
9 helpful, put it in there.

10 But confer with each other. Give me a clean list of
11 stipulations, and then I will explain to the jury that in order
12 to help streamline the trial and make most efficient use of the
13 jury's time, the parties have agreed to a number of facts.
14 Those are called stipulations. "Members of the jury, here are
15 the agreed-upon facts that you should take as now having been
16 proven."

17 MR. FRANZINI: Thank you, Your Honor.

18 MR. O'NEAL: Judge, I don't know if now is the right
19 time. But those two that I'm talking about, one is paragraph
20 19, "With POM, ViSalus used two campaign strategies, Press One
21 and Voice Casting." That does not say that that is the only
22 strategy or campaign strategy that was used within POM, but
23 that is exactly what the plaintiff has grabbed on and run with.

24 Similarly, if you look at one of the earlier numbers,
25 it makes a reference, Judge, that we used the phone system with

1 respect to marketing campaigns. Well, marketing is, in the
2 words of the Oxford Dictionary, certainly much broader than the
3 legal definition of what constitutes "telemarketing" under the
4 TCPA. But at the same time, I've seen that, where they say,
5 look, they stipulated that this was tele-market --

6 THE COURT: Let's do it one at a time.

7 MR. O'NEAL: Sure.

8 THE COURT: On paragraph 19, you're telling me that
9 it implies that ViSalus used only two campaign strategies. But
10 to really be fair, it was two strategies, among others?

11 MR. O'NEAL: Correct.

12 THE COURT: All right. Let me ask plaintiff: When
13 you prepare your list, any objection to phrasing that paragraph
14 as, "With POM, ViSalus used two campaign strategies, among
15 others? They are . . ." And then you continue.

16 MR. FRANZINI: Yes, Your Honor, we do object to that.

17 THE COURT: Why?

18 MR. FRANZINI: Because that's not what the
19 stipulation was and not what the stipulation says. What the
20 parties agreed to at the time was that POM uses two campaign
21 strategies, Press One and Voice Casting. That's what we have
22 been relying on this entire time throughout this case.

23 THE COURT: Then why didn't the stipulation read
24 "used only two campaign strategies"?

25 MR. FRANZINI: Your Honor, what it says is that it

1 used two campaign strategies. It doesn't say "used two, among
2 others." If ViSalus actually used three campaign strategies or
3 ten campaign strategies, then it should have said so in the
4 stipulation. The reason it didn't say so is because, with POM,
5 ViSalus used two campaign strategies. They used Press One, and
6 it used Voice Casting. Press One had the POM machine that was
7 running -- going through these contact lists. There was 5,000
8 a day -- more than 5,000 a day. There were only fewer than 10
9 people working this machine. The truth is, they were using two
10 campaign strategies, and these are the two they were using.

11 THE COURT: Now, at the end of that paragraph 19,
12 there is a reference to Justin Call's (phonetic) deposition. I
13 take it that's the support for that statement?

14 MR. FRANZINI: Your Honor, I think that's some
15 support for that statement. I don't think it is the exclusive
16 support. If they want to include that deposition transcript
17 and argue that that means something else, then I think that's
18 something they can do. But I don't think they should be
19 allowed now to withdraw the stipulation or modify it, for all
20 the reasons Your Honor said in your order.

21 THE COURT: Let me ask, what evidence does the
22 defendant have that they used more than two campaign strategies
23 with POM?

24 MR. O'NEAL: Judge, I believe the evidence will show
25 that many of the campaigns were what's known as "hot connect,"

1 and hot connecting is where an auto dialer will call the
2 number. It connects to someone. And then "congratulations,"
3 it just goes to a live operator in an operator room.

4 But more to counsel's point, this is exactly it.
5 Let's just look at the words literally. This is neither
6 inclusive or exclusive. The statement itself says we use them,
7 which we did. And we did. But it doesn't say that's the only
8 thing that we did, and that's the only possibility, et cetera.
9 It is an unfair and prejudicial jump for the plaintiff to make
10 that contention.

11 MR. FRANZINI: May I respond to that, Your Honor?

12 THE COURT: Please.

13 MR. FRANZINI: If counsel has evidence about this hot
14 connect strategy, then he should certainly present that to the
15 jury and make the argument that he just made to Your Honor
16 about the meaning of the sentence. What we are doing now -- we
17 have the stipulation. We have had it for two years. If
18 counsel wants to argue that there is no "only" there, he is
19 certainly entitled to do that. But he shouldn't be allowed now
20 to change a stipulation to include something helpful that helps
21 him make this argument that he is making to Your Honor now to
22 the jury. He should have to argue -- make the same exact
23 argument based on the stipulation that ViSalus entered into
24 while represented by counsel two years ago that we have been
25 relying on this whole time.

1 THE COURT: All right. Here is what I'm going to do
2 with this. I'm going to allow the stipulation to be used by
3 the plaintiff as it's currently written, but I'm going to put
4 on two provisos. No. 1, I'm not going to let you argue to the
5 jury that it means or reads "only two." If I hear you say
6 that, No. 1, I will sustain an objection. But even if I don't
7 hear an objection, I may jump in and say, "Now, Counsel, as we
8 discussed, it doesn't use the word 'only.'" I don't think
9 that's a fair extrapolation.

10 No. 2, if the defendant now wants to amend its
11 witness list and add a witness to explain and give context to
12 this paragraph 19, I'm going to let them do that. Just let me
13 know and let plaintiff know if you are adding a witness that
14 wants to give this testimony, and that witness will be heard.

15 MR. O'NEAL: We will provide that notice within 12
16 hours if we make that decision, Judge.

17 THE COURT: Okay. Now, what was the other paragraph
18 you wanted to talk about besides 19?

19 MR. O'NEAL: If you go to --

20 MR. FRANZINI: Your Honor, may I ask one point of
21 clarification?

22 THE COURT: Of course.

23 MR. FRANZINI: We are not going to say that the
24 stipulation says "only." But if it turns out that there is no
25 evidence in this case that ViSalus used any other strategy, we

1 should be able to argue, in closing and when cross-examining
2 their witnesses, "You agreed to this, if you had more
3 strategies, you would have said so, and you would have put
4 forward evidence" --

5 THE COURT: No. But I think you can point out to the
6 jury that paragraph 19 says that they used two campaign
7 strategies. "Members of the jury," in closing argument, you
8 can tell then, "there is no evidence that they used any other
9 strategies," assuming that's an accurate statement. That
10 should be sufficient.

11 MR. FRANZINI: Thank you, Your Honor.

12 THE COURT: What was the other paragraph?

13 MR. O'NEAL: Judge, if you'd turn to -- if you'd look
14 at paragraph 13.

15 THE COURT: Yes.

16 MR. O'NEAL: Here is some context. For example, and
17 we may get into this when we talk about some of the audio clips
18 that plaintiff is looking to put in. There would be messages,
19 for example, that would say, hey, just a heads-up, we are
20 holding a national seminar on such and such a place, come on
21 now, or they would be do other types of calls that don't fit
22 the definition of "telemarketing."

23 What the plaintiff is attempting to do is to say, by
24 the use of the Oxford Dictionary word "marketing," that that is
25 a concession that everything in here was that it was

1 telemarketing as defined by the statute, and that's not what
2 was stipulated to.

3 THE COURT: I understand that. "Marketing" does not
4 mean "telemarketing." If I hear them argue that this paragraph
5 implies that this was all telemarketing, you can make your
6 objection. I would anticipate sustaining it, and I would
7 probably even jump in myself, even without an objection, to
8 say, "It says marketing; it doesn't say telemarketing."

9 MR. O'NEAL: That's all I have got on the stip,
10 Judge.

11 THE COURT: Okay. Then I look forward to both sides
12 working together to put it in a more jury-friendly fashion.

13 All right. Does the plaintiff want to be heard now
14 on any of these other exhibits? By the way, let me ask -- I
15 did say I wouldn't preadmit. Does the defendant have any
16 objection to me preadmitting Exhibits 2, 3, 4, provided
17 plaintiff removes page 4-3, and 61?

18 MR. O'NEAL: No, Judge.

19 THE COURT: Any objection from plaintiff to
20 preadmitting 204? I guess you did have an objection. Never
21 mind. We won't preadmit 204.

22 MR. FRANZINI: Your Honor, before you do that,
23 Exhibit 3 is defendant's interrogatory responses.

24 THE COURT: Okay.

25 MR. FRANZINI: So that's an exhibit that we can use

1 against them, but they don't have any hearsay exception to.

2 THE COURT: So you don't want it pre-admitted?

3 MR. FRANZINI: Right.

4 THE COURT: Then you know what, then the safest thing
5 to do is I'm not going to preadmit anything. You offer 2 when
6 you want, and I will expect to hear from defendant, "No
7 objection," and I will say, "Received." If you choose to offer
8 Exhibit 3, if you offer Exhibit 3, I'll ask defendant, "Any
9 objection?" If they say, "No objection," I'll receive it.
10 Once it is received, they can do anything they want with it.
11 If you choose not to offer it, you choose not to offer it.

12 MR. FRANZINI: Thank you, Your Honor.

13 THE COURT: So nothing will be preadmitted.

14 Is there any other exhibit that you want to talk
15 about, that plaintiff wants to talk about now? Otherwise, my
16 plan would be to, No. 1, let plaintiff go through all these
17 exhibits and tell me for any of them, if they relate only to
18 willfulness or knowingly, take them out. I'll sustain an
19 objection that they don't belong to the jury if they relate
20 only to willfulness or knowingly. If that's all they relate
21 to, then they are not going to the jury. If you can tell me
22 that now, great. If you need a little bit more time, that's
23 fine too.

24 Once you've done that, my expectation will be that
25 you need to offer it. If there is an objection at trial, I'll

1 hear what the objection is. If the objection is lack of
2 foundation, or hearsay or even 403, I'll consider it. I'll
3 make my ruling. I will say this: If it is a record that looks
4 to me like it is a business record and was produced by the
5 defendant, I'm not going to require much more in the way of
6 foundation. I'm not going to require the jot and tittles of
7 business records unless there is something that looks somehow
8 manipulated or inappropriate about it. If it was produced to
9 you by the defendant and it otherwise looks like a business
10 record, I'm not going to fuss around about it too much, unless
11 the defendant calls my attention to it either now or before
12 trial, and then I'll take a close look at something.

13 MR. O'NEAL: I do have a question, Judge.

14 THE COURT: Yes.

15 MR. O'NEAL: Your view on foundation -- let's assume
16 it is a business record. I believe the rules require
17 additional foundation by a witness or otherwise to say, "And
18 when you look at column A, and you see a squiggle, this is what
19 it means." In this instance, when I make foundation
20 objections, that's what I really think. We are missing a lot
21 of what I'll call the connective tissue of what it says.

22 THE COURT: Well, in terms of receiving the exhibit,
23 I'm not going to be such a stickler on foundation. But if an
24 exhibit is a business record because it was produced by
25 defendant, and the plaintiff's lawyers wants to tell the jury

1 what a particular column means or what a particular squiggle or
2 mark means, and you object, I'd anticipate sustaining that
3 objection.

4 MR. O'NEAL: Understood, Judge.

5 MR. FRANZINI: Your Honor, we have several exhibits
6 that we were hoping to get preadmitted so we could use them in
7 opening statement.

8 THE COURT: Sure. We can talk about them.

9 MR. FRANZINI: Thank you, Your Honor. I have some
10 slides.

11 THE COURT: I would just as soon hear the exhibit
12 number, but do whatever you want with your slides.

13 MR. FRANZINI: The first one that is really
14 important. It is Exhibit -- it is really Exhibits 36, 37, and
15 38.

16 THE COURT: Should we start with 36?

17 MR. FRANZINI: I think we should start with 38.

18 THE COURT: 38. 38 is the one, if I recall
19 correctly, that essentially is 405 exhibits.

20 MR. FRANZINI: That's right, Your Honor. It is 405
21 exhibits, but they all look very similar. I think they will
22 rise and fall together. These exhibits are the contact lists
23 that the POM machine used to place calls at issue in this case
24 to class members that used an artificial or prerecorded voice.

25 THE COURT: They are called contact lists, okay.

1 MR. FRANZINI: That's right. There is 405 of them.
2 I put an example of one of them on the board so you can see it.
3 It has name and phone number -- and then how the POM machine
4 worked was, somebody at ViSalus would take these contact lists,
5 would upload them into the POM machine, and then the POM
6 machine would go through each number on the list and call each
7 number on the list.

8 At the end of the call, the POM machine would assign
9 a disposition code or a completion code to the call. That's an
10 example that is set forth here. For example, "answer machine,"
11 that means that the call was picked up by an answering machine.

12 So these are the 405 that were -- I'll get to this in
13 a second. These are the ones that were identified by
14 Mr. Gidley, their class representative, and are the ones that
15 deal with marketing campaigns and that were made to U.S.
16 residents using the POM machine.

17 THE COURT: Let me ask this: First of all, I assume
18 that these exhibits in 38, the contact lists, they were
19 produced to you by defendants?

20 MR. FRANZINI: That's right, Your Honor.

21 THE COURT: If we go back to that last page, where it
22 said, "Reason; answer machine." Now, by itself, I don't know
23 what "answer machine" means or "no answer" means or "ring no
24 answer" means. I can guess, but I don't know. Do you have
25 testimony as part of your designated deposition testimony from

1 Mr. Gidley or someone else at defendant that explains what you
2 just said that column means?

3 MR. FRANZINI: Yes, Your Honor. We have a
4 declaration that was submitted right here by Mr. Gidley. It
5 was submitted under oath.

6 THE COURT: That's Exhibit 37?

7 MR. FRANZINI: That's right.

8 THE COURT: All right.

9 MR. FRANZINI: It was provided to us in the same
10 email correspondence that linked the share file that had these
11 405 exhibits on them.

12 THE COURT: Got it.

13 MR. FRANZINI: In paragraph 2, he says he is the
14 compliance analyst at ViSalus. He is authorized to make this
15 declaration on behalf of ViSalus. He then says, "As the
16 30(b)(6) representative, I reviewed some documents, including
17 specifically the contact spreadsheets that were produced in
18 this action." In paragraph 5, he explains what those are. He
19 says, "ViSalus ran these marketing campaigns to U.S. residents
20 using POM." They are identified by spreadsheet names on these
21 two exhibits that I will talk about later, and all of these
22 spreadsheets are listed in the attached Exhibit A.

23 THE COURT: Understood.

24 MR. FRANZINI: I don't have a slide on this right
25 here, but if you look at paragraph 7 of that same declaration,

1 he talks about -- I think it is paragraphs 6 and 7, he actually
2 talks about the disposition codes.

3 THE COURT: Understood. I get it.

4 Okay. So let me turn to defendant and ask, any
5 objection to Exhibit 38? Then I'll ask about 37.

6 MR. O'NEAL: Yes, Judge. So accepting how you treat
7 what looks to be and smells and walks and talks like a business
8 record, reserving my objection to some of the specifics, this
9 doesn't say what they just said. I heard a great narrative
10 about, "Well, this is how worked," and everything. That's
11 great testimony by counsel, but I don't think they are going to
12 be able to put forth some deposition testimony or a live
13 witness that actually can spin the story in the manner that was
14 said. So that's the first thing.

15 But then second, you pointed out, Judge, I think I
16 know what an answering machine is, but "answering machine"
17 isn't in Mr. Gidley's declaration. As a matter of fact, I
18 think the second one that you identified isn't in Mr. Gidley's
19 declaration either.

20 So this gets back to what I'm saying when I was
21 talking about the squiggly line. I just don't think, Judge,
22 that the plaintiffs have got enough here that they can actually
23 put everything in on this exhibit as part of opening. Maybe it
24 comes in, and then we go back to the "I'm going to shut you
25 down if it doesn't come in."

1 THE COURT: Here is what I'm going to do: I'm very
2 concerned about you making comments about what the exhibits
3 show in opening statement. I don't want you to be the one -- I
4 don't want a lawyer for the plaintiff to be the one that
5 teaches the jury how to read these exhibits. So I will tell
6 you this: I do anticipate that if during the trial you offer
7 Exhibit 38, I expect to receive it in evidence. If you offer
8 37, I expect to receive it in evidence.

9 Then you may tie it together with -- whether it be
10 the Gidley deposition experts, and he can explain what things
11 mean. And then in closing argument you're welcome to tell the
12 jury what evidence they have heard about what it means.

13 But what I don't want to have happen, and that's
14 because I'm not going to preadmit it and let you show it to the
15 jury in opening, I'm not going to let you take the jury through
16 the exhibit and then you become the witness that tells them how
17 to read it.

18 Now, that said, you are welcome in opening, like any
19 other classic opening statement, to tell the jury that you
20 believe the evidence in this trial will show that there are a
21 number of documents that are called contact lists. They come
22 from the defendant's POM system, and you believe the evidence
23 will show that the POM system does this and that. And you
24 believe that the evidence will show that from these contact
25 lists, they will learn the following. And then if that's what

1 the evidence shows at trial, more power to you. But if that's
2 not what the evidence shows, then you will have a more limited
3 closing argument, and the defendant will have an opportunity to
4 show at closing argument that you didn't deliver, as promised.

5 But what I'm not going to let you do is become the
6 witness for the document in opening statement. So I'm not
7 going to preadmit them. I'm not going to let you show 37 and
8 38 to the jury in opening, but I'll give defendant fair notice
9 at some point in the trial -- and it could be in the middle of
10 reading Scott Gidley's deposition. When you're reading Scott
11 Gidley's deposition, and he refers to some of this, and you
12 say, "I would like to pause the reading now and offer 38 into
13 evidence." I will receive 38 into evidence. You can show
14 something that's in there, and then pick up with Gidley's
15 deposition.

16 Understood, everybody?

17 MR. O'NEAL: Understood, Judge.

18 THE COURT: Okay. Do you want to talk about 36?

19 MR. FRANZINI: Your Honor, 36 is a summary of what's
20 shown in the contact lists in 38.

21 THE COURT: Go ahead.

22 MR. FRANZINI: I do want to address one thing that
23 opposing counsel said, because it seems like the main objection
24 here is that we don't know what these completion codes mean,
25 and that's actually set forth in paragraph 6 of Gidley's

1 declaration.

2 THE COURT: By all means. And I'm going to let you
3 go back and forth. Once we receive 37 and 38 in evidence. I
4 am going to let you point out something in 37. Then if you
5 want to do a split screen, if you want to go back and forth,
6 show what you want to show in 38. I will give you plenty of
7 freedom on that.

8 36 is a summary, I presume that you are offering
9 under Rule 1006?

10 MR. FRANZINI: That's right, Your Honor.

11 THE COURT: Any objection to 36?

12 MR. FOSTER: Yes, Your Honor.

13 THE COURT: Basis.

14 MR. FOSTER: The first objection would be, of course,
15 we don't believe the underlying documents are admissible.
16 Before we get there, one small objection. Summaries can't be
17 argumentative. They can't have an opinion. We have a footnote
18 here that highlights and explains to the jury which of these
19 calls that are an artificial or prerecorded voice could have
20 been delivered to.

21 I understand they are pulling that from Mr. Gidley's
22 affidavit, but they are certainly welcome to -- I think that
23 highlights that, and the footnote needs to go, along with
24 the -- if you go to the second page, where it says "number of
25 calls where no artificial or prerecorded voice could have been

1 played according to Mr. Gidley," I think that needs to be
2 struck as well.

3 THE COURT: Let me first ask plaintiff's counsel
4 response on that footnote 1.

5 MR. FRANZINI: Your Honor, footnote 1 says -- if we
6 could go back to Mr. Gidley's declaration in Exhibit 37.
7 Basically what he says in paragraph 6, he says that the
8 disposition codes -- those codes like "answering machine; no
9 answer; answer human," things like that, to the best of my
10 knowledge, ViSalus did not alter the meaning of the POM
11 disposition codes, also called completion codes, from the
12 definitions set forth in page 85 through 89 of Using Proactive
13 Outreach Management Manual. That was Exhibit 19 to the
14 deposition.

15 So he is saying, "Here is what these things mean."
16 Then he goes on to say, "To the best of my knowledge, the
17 following disposition code indicates no voice mail had been
18 played," and then he lists seven or eight of them. So all that
19 footnote is doing is identifying the ones that are listed on
20 paragraph 7 of Mr. Gidley's deposition. Then the summary that
21 counsel referred to, that just adds up the disposition codes
22 that fall into that list, and so I think that's an
23 inappropriate summary.

24 THE COURT: Is the summary derived from Exhibit 38
25 and nothing else?

1 MR. FRANZINI: Your Honor, the numbers on Exhibit 36,
2 those are all from 38. The footnote is from Exhibit 37.

3 THE COURT: Right. That, I understand. The numbers
4 are from 38?

5 MR. FRANZINI: Yes, Your Honor.

6 THE COURT: All right. Does the defendant challenge
7 the accuracy of those numbers?

8 MR. FOSTER: Well, that's an interesting question,
9 Your Honor, because the point I would like to get to is how
10 this summary was created.

11 THE COURT: Right.

12 MR. FOSTER: It is not just, from our understanding,
13 the exhibits in 38. This isn't just a compilation of
14 everything in the spreadsheets of 38. Instead, what I
15 understand -- and again, we have had conversation, Mr. Franzini
16 and I, back and forth. I think what I understand happened, is
17 they took all of the spreadsheets in Exhibit 38 and combined
18 them all together. So we've got one massive spreadsheet -- all
19 the names, all the numbers, all the disposition codes in one
20 Excel spreadsheet.

21 Then they took the KCC, which is the claims
22 administrator here -- the notice administrator. They took a
23 list that KCC put together for the notice and then somehow
24 scrubbed that against the summary of 38 to create this summary.

25 So I'm concerned that it is in fact -- obviously that

1 KCC notice list is not on their exhibit list. It is
2 inadmissible hearsay. I'm concerned that that infuses a
3 summary with inadmissible hearsay. It is not a pure summary of
4 those exhibits. It has been manipulated in some respect.

5 THE COURT: Any response from plaintiff?

6 MR. FRANZINI: Your Honor, the only thing that we did
7 with the KCC class list is that we removed any entries in the
8 summary of call-outs in the exhibit that were not two numbers
9 that were on the class list. This is a summary of all the
10 numbers to the class found in Exhibit 36.

11 THE COURT: All right. Here is what we are going to
12 do: When it is offered, I'm going to receive Exhibits 38 and
13 37. I am going to reserve ruling on 36, because I think we
14 need foundation testimony. As soon as we have foundation
15 testimony that explains how 36 was put together, I'll make my
16 ruling.

17 To the extent that it may go to weight, not
18 admissibility, I probably will allow 36 once there is
19 appropriate foundation testimony. But if it goes to something
20 more fundamental, I'll hear argument, and I may not admit it.
21 But given the discrepancy between the parties in terms of how
22 36 was compiled and what these numbers actually show, I think I
23 will need foundation testimony, and so I will reserve ruling on
24 36.

25 MR. FOSTER: Very well, Your Honor.

1 MR. FRANZINI: Thank you, Your Honor.

2 THE COURT: Okay.

3 MR. FRANZINI: There were a couple more exhibits that
4 Mr. Jacobson is going to address.

5 THE COURT: Very good. Mr. Jacobson.

6 MR. JACOBSON: Your Honor, I have an exhibit bucket
7 here. This is a collection of exhibits that are very similar
8 to each other.

9 THE COURT: One moment. P15 would be a good example.
10 Give me one moment, please.

11 I'm ready.

12 MR. JACOBSON: I should probably read these numbers
13 into the record. These are P8, P11 --

14 THE COURT: I don't think you need the "P." They are
15 all plaintiff's exhibits.

16 MR. JACOBSON: 8, 11, 13, 15, 17, 19, 20, 22, 24, 26,
17 and 27.

18 THE COURT: What would you like me to look at first?

19 MR. JACOBSON: Exhibit 15.

20 THE COURT: All right. I'm on 15.

21 MR. JACOBSON: What these are, Your Honor, are
22 applications that that ViSalus used to sign up promoters, to
23 sign up the class members, and ViSalus took information from
24 the class members, including their home and cell phone numbers,
25 which, of course, is relevant to showing that the numbers that

1 got uploaded in the POM system. These applications show how
2 ViSalus got this information and how they put it in the contact
3 sheets, and uploaded into POM. We know those are home and cell
4 phone numbers. If you look at Exhibit 15, if you see the box
5 that says, "Step 5, personal information."

6 THE COURT: I do.

7 MR. JACOBSON: Then if you look in the right column,
8 there is a heading that says "Communication preferences," below
9 that ViSalus requested two numbers, home phone number and
10 mobile number, so business line. That's the relevance.

11 THE COURT: Okay. Does the defendant have an
12 objection to this type of exhibit, or Exhibit 15?

13 MR. O'NEAL: Yes, Judge. Again, a great narrative,
14 but I think what's going to happen is that they are not going
15 to be able to get from A to B to C to D. I will note that
16 these things are blank. If they can get a witness to come in
17 and testify as part of their case-in-chief, which I don't think
18 they can, Judge, that somehow this form was filled out by every
19 person on the class, and that information was then taken and
20 put into some sort of database, and then that database is what
21 was used to deliver the spreadsheets, which was then in turn
22 used to dial the numbers, then, Judge, I think it is coming in.
23 But until they get that, that's just argument of counsel.

24 THE COURT: Here is what I'm hearing from you: In
25 order to prove a case, plaintiff needs to build a wall. A wall

1 is composed of multiple bricks. It sounds to me like you are
2 objecting to one particular brick on the grounds that this
3 brick does not prove a wall, and I don't think that's a good
4 objection. If, however, you were to say, "Fine, even if this
5 brick comes in, there is not going to be enough bricks to prove
6 a wall," okay, fine. I understand that. I see that argument
7 coming. But I don't see that as an argument against a brick.

8 MR. O'NEAL: I understand, Judge. Let me rephrase.
9 I think by the time the evidence comes in, I am going to be
10 able to argue to you and the jury that they didn't make a wall.

11 THE COURT: Okay. That would be a very interesting
12 argument. I assume you will make it to the jury. I assume you
13 will make it to me, as judgment as a matter of law at the close
14 of plaintiff's case, but that's not going to be sufficient to
15 keep out Exhibit 15, if it is a business record or a record
16 that ViSalus uses.

17 MR. O'NEAL: Understood.

18 Can I now then twist to something else?

19 THE COURT: Yes. Give me a moment. I want to take a
20 fast look at these exhibits that Mr. Jacobson showed me. So 8,
21 11, 13, 15, 17, 19, 20, 22, 24, 26, and 27. These all came
22 from ViSalus?

23 MR. O'NEAL: Correct, Judge.

24 THE COURT: Okay. It still takes more than about a
25 dozen bricks to make a wall, but I anticipate when plaintiff

1 moves the admission of these documents, I expect to receive
2 them in evidence.

3 MR. O'NEAL: Understood, Judge.

4 THE COURT: By the way, let me advise plaintiff,
5 let's not be cumulative here. So do take a close look. If you
6 say you really need them all, I'll give that a lot of
7 deference. But do take a close look if you need them all.

8 MR. JACOBSON: Understood, Your Honor.

9 MR. O'NEAL: Judge, that brings in another issue
10 since you've indicated where you're ruling. A little bit of
11 history: There are two let's just call them applications of a
12 similar form. They were marked previously as Plaintiff's
13 Exhibits 23 and 29 that we would like to add as exhibits. Let
14 me give you the background on what happened.

15 As Your Honor may recall, under the original pretrial
16 order, plaintiff was to submit their exhibits; defendant was to
17 submit theirs. Then Your Honor graciously gave us time to
18 submit an amended list --

19 THE COURT: And then they withdrew 23 and 29.

20 MR. O'NEAL: Yes. Importantly, Judge, those
21 things -- we were supposed to submit our exhibit lists
22 simultaneously. I pulled out stuff and didn't plan on adding
23 it on my list because I thought they were going to use them,
24 and then they pulled them out.

25 THE COURT: May I see 23 and 29?

1 MR. O'NEAL: Yes. May I approach, Judge?

2 THE COURT: Yes.

3 Is the plaintiff going to have any objection if
4 defendant offers 23 and 29, either renumbered or kept in that
5 numbering system?

6 MR. JACOBSON: I think we do, Your Honor, but I would
7 like to first look at the exhibits.

8 THE COURT: Of course.

9 MR. JACOBSON: I believe Mr. Franzini might have
10 corresponded with counsel on this one. May I consult?

11 THE COURT: Of course. Let me tell, Mr. O'Neal, most
12 likely I'm going to want to have you renumber them as
13 defendant's exhibits because the jury is going to be viewing
14 the numbers in this range as plaintiff's exhibits. If they
15 don't like the exhibits, and I let them in any way --

16 MR. O'NEAL: Yes, Judge, we can do that.

17 MR. FRANZINI: Your Honor, we do object to those
18 exhibits.

19 THE COURT: Tell me why.

20 MR. FRANZINI: Those two exhibits are -- so there are
21 a number of promoter applications that Mr. Jacobson showed you.
22 Those applications were produced by ViSalus. We got testimony
23 from them from multiple witnesses saying, "All of our
24 applications are for promoters and for customers." To just
25 take a step back, a promoter is a member of their multilevel

1 marketing organization that sells products to other people. A
2 customer is an end user, somebody who doesn't resell, just buys
3 products.

4 So we took testimony from their witnesses, including
5 their 30(b)(6) witness, Mr. Gidley. Everybody said that all
6 the promoter applications and customer applications are all the
7 same during the relevant time frame.

8 I believe there is a stipulation on this that says,
9 whether online or in print, all of the applications are
10 identical. Included in the set of applications that they sent
11 us, unbeknownst to me until recently, were two exhibits that
12 are actually titled "customer applications" instead of
13 "promoter applications." Those applications have not been
14 authenticated by anybody. They look different. They have
15 different information in them.

16 They only gave us those two copies. One is in
17 English; one is in Spanish. The date in the margin is 2012,
18 which is before the relevant time frame. So these are two
19 unauthenticated customer applications that go against
20 everything that they have been saying so far in this case.

21 They are going to try to suggest to the jury that
22 somebody from the class filled out this application as opposed
23 to something with the same content. If they had brought this
24 up before, we would have sought discovery as to why it is that
25 we never got any of the more recent ones. As far as we know,

1 this was something that was on a shelf in ViSalus's office that
2 was never used. It was from 2012, and so we think it would be
3 prejudicial to bring it in now.

4 THE COURT: You mentioned the time frame. Remind me
5 what's the relevant time frame, please.

6 MR. FRANZINI: I believe it is 2014 to 2016. It is
7 possible that it goes back as far as 2013 when they started --

8 THE COURT: Are 23 and 29 are dated 2012?

9 MR. O'NEAL: They have a bottom, Judge, a copyright
10 "2012, ViSalus, Inc.," but that doesn't necessarily define when
11 they were necessarily used.

12 THE COURT: I'm going to handle it the same way I
13 handled 36. That is, if there is an appropriate foundation
14 laid by defendant that 23 and 29 were in fact used by ViSalus
15 during the relevant time frame, I would expect to let them in.

16 MR. FRANZINI: Thank you, Your Honor.

17 THE COURT: You need foundation though.

18 MR. O'NEAL: Understood, Judge. We will renumber
19 them as defense exhibits.

20 THE COURT: Thank you.

21 When you put them on my exhibit list for me, let's
22 say you renumber them as 200. Will you put somewhere "formerly
23 23" and then 201.

24 MR. O'NEAL: For your set only?

25 THE COURT: The exhibit list doesn't go to the jury

1 anyway. For my sake only. You don't have to put that in the
2 electronic copy that you give to the courtroom deputy.

3 MR. JACOBSON: Your Honor, the next two exhibits we
4 would like Your Honor to rule on ViSalus objections are P43 and
5 58. P43 is a folder that contains, I believe, 19 examples of
6 ViSalus's prerecorded messages. P58 is a screenshot with the
7 file names that we used in part to authenticate these exhibits.

8 May I play Your Honor one short example?

9 THE COURT: In a moment. Not yet. One moment.

10 Yes, you may.

11 (The following audio was played in open court and
12 transcribed as follows:)

13 "Hi, this is Jim contacting you from Body by Vi. We
14 were offering out to you to offer you 50 percent off as we go
15 into our spring season here. If that is anything that
16 interests you, please feel free to give me a call at
17 (248) 764-7521, where I will be more than happy to assist you.
18 Thanks so much for your time and for being a part of Body by
19 Vi."

20 MR. JACOBSON: Your Honor, I will briefly address the
21 relevance, and then I will like to go over the objections that
22 ViSalus stands by. I will address those. These are clearly
23 relevant. These are examples of the prerecorded messages that
24 ViSalus had and used with class members.

25 THE COURT: And where is the evidence that this is

1 what they used with class members?

2 MR. JACOBSON: What we did, Your Honor, is we stuck
3 some examples in front the witnesses and asked them if they
4 used them with class members, and they said yes.

5 THE COURT: And is that part of the deposition
6 designations?

7 MR. JACOBSON: I can show it to you right now. I
8 believe it is, Your Honor.

9 THE COURT: I'll take your word for it.

10 Any objection?

11 MR. O'NEAL: Yes, Judge. First of all, defendant
12 disputes that these are messages that were played in a way that
13 violates the statute. Also, to the point, I think the only
14 deposition testimony that they have that a message was actually
15 played in the manner and the foundation that they've described
16 is a message to the plaintiff from one of the promoters,
17 somebody in her up-line, and the testimony came in that that
18 was played to a very limited number of people.

19 But there isn't any other testimony, which if they
20 could have gotten it, they would. It is like, "Listen to
21 message No. 1. What is that? Is that a message that was
22 played to people in the class? Sure." That's not in the
23 deposition testimony.

24 Not only that, look at the title of these, and they
25 don't foot the bill. Apparently they're contending the credit

1 card declines aren't marketing, but if you look at the second
2 one, "CC declined" or "one has expired."

3 MR. JACOBSON: We are not offering that.

4 MR. O'NEAL: Then NST, National Sales Training.

5 That's a center --

6 THE COURT: Let me cut to the chase. You are not
7 offering some; you are not offering others. Whenever we get to
8 a portion of a deposition excerpt, deposition testimony, where
9 the witness says -- where the witness is asked, "Was the
10 following wav. file used by ViSalus," and he or she says "Yes,"
11 I will then let you suspend the reading of the deposition, and
12 now you can play to the jury the wav. file that was referred to
13 by that witness.

14 I will invite any other objections at that time. But
15 that way, we will have laid a foundation that this was
16 presented to the consumers or to the class members. That way,
17 any ones that you wish to offer, just lead up to it with the
18 deposition testimony. I'll let you suspend the reading of the
19 deposition testimony. So if you have a witness up here reading
20 it, and the witness is asked, "Let me now play for you a wav.
21 file that we have identified as ABC. Was that something that
22 was used by ViSalus during this relevant period?" If the
23 witness says, "Yes," then you can say, "Judge, we would like to
24 suspend the reading now and play that wav. file for the jury."
25 My practice would be to turn to the defendant and say, "Any

1 objection?" Unless I've heard something beyond what I've
2 already heard, I'm going to say, "Fine, you may do that."

3 MR. JACOBSON: Let me explain, Your Honor, why after
4 we played that testimony that authenticates the specific
5 examples, all of the ones we are offering should come in,
6 ViSalus has objected to authenticity. As Your Honor knows, one
7 way to authenticate something is to have a witness listen to it
8 and say they know it. Another way you authenticate something
9 is for a jury to then compare distinctive characteristics.
10 That's another example. You look at an authenticated specimen
11 and the trier of fact --

12 MR. O'NEAL: Judge, to be clear, the only reason --

13 THE COURT: Hold on, folks. I generally don't like
14 people interrupting. Let him finish his sentence. By the way,
15 the best to signal to me that you would like to say something
16 when the speaker is done, stand. When he is done, I will call
17 on you.

18 MR. O'NEAL: Judge, I apologize to you, and I
19 apologize to you.

20 THE COURT: Mr. Jacobson, complete your thought.

21 MR. JACOBSON: Your Honor, we have authenticated
22 specimen examples, these two we played. These are the
23 testimony from ViSalus's witness that the use of the
24 Progressive Outreach Manager -- POM -- and was sent to the
25 plaintiff.

1 And here is another example, and we will play this
2 one, and this witness testified this was sent out through POM
3 and that it sounded similar to the previous example.

4 With these two examples what the jury can then do is
5 listen to the other messages and compare the similarities to
6 authenticate all of them. There are numerous similarities.
7 Let me just give --

8 THE COURT: I get that. Let me ask you this: Let's
9 assume there are lots of similarities. How will the jury know
10 that a similar-sounding message was actually used?

11 MR. JACOBSON: Two thoughts on that, Your Honor.
12 First, relevance is any tendency to prove a material fact. The
13 fact that ViSalus had these and produced them to us, and they
14 sound like the ones used certainly has a tendency to show that
15 they used them. If you've got shotgun shells, and you fire two
16 of them, Your Honor, there is evidence that you've fired
17 shotgun shells --

18 THE COURT: Did you ask ViSalus, either with a
19 request for admissions or interrogatories, to admit that they
20 have used these other recordings or to identify an
21 interrogatory answer which recordings they used?

22 MR. JACOBSON: No, Your Honor. We didn't ask them
23 for a specific admission for which ones they used, but that is
24 not necessary to overcome the relevance bar, which is a very
25 low bar.

1 On top of that, Your Honor, Ms. Wakefield is going to
2 testify that in couple of these the voice sounds similar, which
3 suggests they played them for her. Again, Your Honor, the fact
4 that they used two and others sound the same, that's relevant
5 evidence. That gets the evidence in. If ViSalus wants to
6 argue in closing that they didn't use them, and that might be a
7 fair argument, but it is not a bar to relevance.

8 THE COURT: Thank you.

9 Mr. O'Neal, you wanted to say something.

10 MR. O'NEAL: Judge, it's a reiteration of the same
11 point. But like I just said, they didn't even get the
12 testimony that the message was actually used.

13 So I'll go back to what you highlighted, which is if
14 they can get the foundation in, as you've said, then I'm going
15 to be in a very different position.

16 THE COURT: But what's your response to
17 Mr. Jacobson's argument that, well, their foundation is that
18 they were produced by ViSalus. They have a very similar sound
19 and feel to the others. And therefore, there is a reasonable
20 inference that they were used because they were produced in
21 discovery to the plaintiffs in this case. It may not be
22 dispositive, but it is relevant to the point.

23 What's your response to that?

24 MR. O'NEAL: My response is that's the same as saying
25 if I speculate that something was done, and I can make an

1 argument about it, then it must be relevant.

2 I mean, I always think about this in the term of
3 foundation. Could a voice mail message be relevant? The
4 answer is, yes, very much so. But you still have to be able to
5 show: All right, in order to demonstrate relevance, was this
6 in fact played? Was it used? What is it? Describe it for me.

7 And without even some of those most fundamental
8 pieces, they don't get there.

9 THE COURT: Mr. Jacobson, I don't understand. Can
10 you explain to me why plaintiff did not, either through a
11 request for admission or an interrogatory, learn in discovery
12 whether or not ViSalus used these recordings?

13 MR. JACOBSON: Your Honor, I need to correct myself.
14 I underestimated the request for production that we did ask
15 about. Let me show you one.

16 THE COURT: Okay.

17 MR. JACOBSON: This is request for production No. 9.
18 We asked ViSalus for all audio recordings of any prerecorded
19 messages or messages using an artificial voice used during the
20 phone calls.

21 THE COURT: Is "phone calls" a defined term in the
22 request?

23 MR. JACOBSON: It is, Your Honor. I believe it is
24 described as phone calls used during the outbound marketing
25 campaign. I can pull that up for Your Honor.

1 THE COURT: Yes. We will address this, and then we
2 are going to bring today's session to a close and plan on what
3 we do next.

4 MR. JACOBSON: Your Honor, I'm going to open up
5 ViSalus's second supplemental response. Let me confirm this is
6 the correct one.

7 It looks correct, Your Honor. I will plug this in
8 and show you the definition of "phone calls," which I hope is
9 in here.

10 THE COURT: If not, we can pick it up next week.

11 MR. JACOBSON: This looks like it just has ViSalus's
12 objections to the definitions. I will have to go to the
13 original to get the definitions, which I should be able to pull
14 up fairly quickly. Yes, I have got out. Here is ours.
15 "'Phone call' or 'phone calls' means or refers to any telephone
16 calls made by you or your representatives promoting your
17 services and/or encouraging the sale of your products and/or
18 services."

19 This is what those POM calls were.

20 THE COURT: Any response from defendant?

21 MR. O'NEAL: No, Judge. I don't know whether we
22 objected to the definition. But if counsel tells me that was
23 the request, I can't respond to it, so I can't give you a
24 contrary point.

25 THE COURT: My tentative inclination is to allow 43

1 and 48. But if you did object to the definition, call it to my
2 attention, and I'll be glad to reconsider.

3 MR. JACOBSON: One point of clarification, for the
4 promoter applications, were those preadmitted?

5 THE COURT: No, I'm not preadmitting anything. You
6 are welcome in opening statement to tell the jury what you
7 expect the evidence was.

8 MR. O'NEAL: For example, I can't press play,
9 "Ladies and gentlemen, you just heard" --

10 THE COURT: Not in opening. In closing, they can.
11 We will talk about limitations so we don't get too much
12 redundancy, but not in opening.

13 MR. JACOBSON: May I play an example in opening?

14 THE COURT: No. You may describe in opening. You
15 may describe it.

16 All right. So I do need to see from plaintiff what
17 is going to be the remainder of the exhibits that you want to
18 introduce, knowing that anything that just goes to willfulness
19 or knowingly has to just go to me.

20 As I said, maybe by tomorrow, but I promise you no
21 later than Friday I will email to all counsel on the official
22 court docket my draft voir dire script, preliminary
23 instructions, jury instructions, final instructions, and
24 verdict form. I would like to talk early next week as to
25 whether or not you have any objections.

1 We can hold off on the final instructions until --
2 well, this trial is going to go really rapidly. I would like
3 to talk about it next week before trial starts.

4 It is my practice to give the jury pretty substantive
5 instructions in the preliminary instructions so they know what
6 to listen for. I also give substantive jury instructions
7 before closing argument.

8 So you'll be welcome during your closing argument to
9 tie whatever you believe the facts have shown to the verdict
10 form and to the instructions that the jury will have already
11 received. You will be able to tell this pretty easily, because
12 you'll see in my draft final jury instructions everything that
13 is going to be read to jury before closing argument. Then
14 there is a big bold statement "closing arguments" and a few
15 wrap-up instructions after that. It is self-explanatory. If
16 you have questions, we can talk about it next week.

17 I do need to tell you about a problem that I have on
18 timing for trial on Wednesday. I apologize, but there is
19 nothing that is going to be able to be done about this.

20 We have our jury panel coming in on Wednesday
21 morning. I expect we will have our jury fully selected before
22 I have to break mid-day. I'm really hopeful too that I will be
23 able to give the preliminary jury instructions to the jury
24 before we break mid-day. We will have to break mid-day
25 probably at 1:00-ish, give or take for Wednesday. That means

1 we will start first thing Thursday with opening statements and
2 your witnesses. But I'm not going to leave until we get our
3 jury picked, and if we are making good time, I will do
4 preliminary instructions then. Otherwise, I will do it first
5 thing on Thursday.

6 I do allow attorney-conducted voir dire. I will do
7 the bulk of the voir dire, but I'll turn it over to one lawyer
8 for each side for 10 or 15 minutes of follow-up. I do not
9 allow people to do mini-opening statements in their voir dire.
10 So do not start talking about the facts of this case. Do not
11 tell them, "In this case you'll hear about such and such." But
12 that said, I think both sides might want to explore the jurors'
13 attitudes towards, for lack of a better name, robo calling.
14 I'll try to think of a more neutral name of describing this,
15 and I'm going to try to explore their attitudes.

16 I am first going to ask if they received anything
17 from ViSalus or been a part of the ViSalus network. If they
18 are, I expect to excuse them. If they haven't, I would assume
19 that every hand will go up, "Have you ever received an
20 automated call?" I will tell you some people enjoy receiving
21 them; some people don't.

22 "This case involves under the Telephone Consumer
23 Protection Act" -- you will see my voir dire script. I will
24 try to explore their attitudes and whether they can base a
25 decision solely on the evidence presented and the law that I

1 instruct. You may hear some things that you will want to
2 follow-up on. You're welcome to do that. But don't turn this
3 into a mini opening statement. Don't ask the jury to make
4 commitments to you. I will ask them to make commitments to me
5 about not doing independent research, not looking things up.

6 I do allow juries to ask questions in writing, and I
7 will present them to you before I give a response to the jury.
8 Some I answer; some I explain that I can't answer. Some I will
9 let you follow up with a witness, if appropriate. I'll tell
10 them about that.

11 I'll ask them to make commitments to me to keep an
12 open mind, but I don't let you ask them to make commitments to
13 you. For example, "If you find such and such, will you promise
14 you will rule for the plaintiff or rule for the defendant?"
15 No, we are not going there.

16 Okay. We will pick a jury. As I said, hopefully we
17 will get to preliminary instructions, but my best guess we are
18 going to have to break for the day at one o'clock in the
19 afternoon and pick up on Thursday.

20 Let's see. Is there anything else? Oh, yes. When
21 would be a good time to pick up on Monday to talk further, and
22 do you want to do it in person or by telephone?

23 MR. O'NEAL: Judge, we will be in town, so whatever
24 works for you.

25 THE COURT: Okay. I think it is better if it is in

1 person, but I'm not going to create hardships for anyone.

2 Plaintiff's counsel?

3 MR. FRANZINI: May we have a moment, Your Honor? We
4 are trying to figure out flights.

5 (Pause.)

6 MR. FRANZINI: Your Honor, we will be here on Monday.

7 THE COURT: Mary, it looks to me like we can start up
8 at 11:00 a.m. Do you agree?

9 THE CLERK: Yes.

10 THE COURT: I don't think it will take all day. I
11 know you have other things you need to do. I have a matter at
12 9:00 and a matter at 10:00. Let's start up at 11:00 a.m.
13 Monday, continuing with our pretrial conference. If we need to
14 take most of the day, I'm am open except for a criminal matter
15 from roughly 2:30 to 3:00. Other than that, I'm totally open.
16 Let's try to get everything done by 2:30, but I'll be available
17 for you, if not.

18 We will talk about your updated exhibits, witness
19 objections, and my draft documents -- verdict form, jury
20 instructions, preliminary instructions, and voir dire.

21 That said, is there anything that we absolutely must
22 talk about tonight?

23 Mr. O'Neal.

24 MR. O'NEAL: My experience in federal court is I'm
25 not permitted to use the room; that I must stay --

1 THE COURT: Oh, no. Everybody is different. I will
2 say this: Everybody is different. Let me tell you how I do
3 it. You're trial lawyers. I'm going to let you try your case.
4 If you want to get up and walk around the room, you do it. If
5 you want to ask questions seated, you do it. If you want to
6 stand from the desk, you do it. If you want to use the podium,
7 that's fine. If you want to ask questions from somewhere else
8 in the courtroom, be a trial lawyer. That's fine. I have no
9 problem with that.

10 Here are my only two restrictions: They are pretty
11 obvious and that is -- I don't know if you ever seen Jerry
12 Spence near a jury box, put his elbow on the jury box, and have
13 a little conversation with the jury. That, I won't allow.

14 Here is the rule: You cannot be close to touch the
15 wood on the jury box. If you are within arm's length of that
16 jury box or closer, I am going to ask you to step back. You
17 may not touch that wood or even get close enough to touch it.
18 I will tell you to please step back.

19 Other than that, stand where you want, except for
20 also with a witness. If you need to show the witness
21 something, refresh your witness's memory, point out something
22 in a document, even though I invite people to help yourself and
23 go on up, most people ask for leave to approach, and I always
24 say yes. But if you don't want to, that's okay. I won't yell
25 at you for that. That's fine. But do your business up here.

1 Point to something you need to point to. Show the witness
2 something. Hand the witness something. But then don't hover
3 over the witness, especially if it is an adverse witness or on
4 cross. I don't want you standing over a witness to intimidate
5 that witness. But if you need to go up and show the witness,
6 by all means, whatever you want.

7 Similarly, if there is something that's blocking your
8 view, or if you need to see something, you don't need to ask
9 permission. Just get up and move to wherever it is where you
10 need to see something, except don't get within touching
11 distance of the wood on the jury box.

12 We will have, I expect, a seven-, maybe an
13 eight-person jury. There will be no alternates. You know we
14 need a minimum of six. So if we end the trial with seven or
15 eight, they all will be there. They will all have to
16 deliberate to unanimity. I will probably put four in the front
17 row and either four or three in the back row closer to me.

18 We will talk more on Monday about how I do the voir
19 dire. It is moderately self-explanatory in my voir dire
20 script. If you have any questions, ask me. Otherwise, I will
21 explain it then.

22 Any other questions?

23 MR. ADAMS: Your Honor, is there a preferred place if
24 we use the easel with maybe butcher paper, and we are using it
25 with the witness, where we put that?

1 THE COURT: Yes. Generally the best place for it is
2 right in that well of the courtroom right where Mr. Jake is
3 sitting. That's where I expect you, or even defense counsel
4 were to do that, most likely whoever is at counsel table will
5 not be able to see it. So then one lawyer -- let's not have
6 everybody -- one lawyer should get up and maybe stand by the
7 witness chair so that you can see it as well. That's how it
8 will work.

9 As long as nobody takes unfair advantage of what's
10 going on, I will let you move around and try your cases. If
11 you want to use a podium during your opening statement or your
12 closing, which I don't think is a good idea, but that's
13 everybody's personal preferences. Just tell Mary, and she will
14 plug it in for you. It has a microphone on it. You are
15 welcome to use it. If you don't want to use it, tell her, and
16 you can do your opening and closing from wherever you want.

17 You should know how to work the Court's technology
18 system. Mary will be available to you by appointment to show
19 you or your staff how to do it.

20 In addition, we have touch screens that the witnesses
21 can use. So if you want to have them circle something or
22 highlight something, Mary can show you how to do that. Then
23 either they can clear it or I'll tell them how to clear it when
24 we get there, before we go to the next slide.

25 Anything else anybody wants to ask or talk about at

1 this time?

2 MR. FRANZINI: One thing, Your Honor. Our first
3 witness is a third party. He doesn't have to be here until
4 Thursday, right?

5 THE COURT: Correct. There is no chance we are
6 getting to a witness until Thursday morning at 9:00 a.m., and I
7 apologize for that.

8 MR. JACOBSON: Your Honor, is there some tiny or
9 non-zero chance we open on Wednesday, just for preparation?

10 THE COURT: If we pick a jury in enough time, and my
11 best guess is it takes us 20 to 30 minutes for preliminary
12 instructions. If we pick a jury, and I can do preliminary
13 instructions, and both sides can do opening -- I don't want to
14 let one side do an opening and not the other, and have all that
15 be done by 1:00, I guess the answer is yes. I can't conceive
16 of that.

17 My best guess is that your openings will be no less
18 than half an hour; hopefully no more than half an hour, but
19 that's up to you. That means we have to be able to start
20 openings at noon. I will give the jury a little bit of a
21 recess before going into openings. That means that I would be
22 doing preliminary instructions at 11:30. That means we would
23 give the jury a mid-morning break -- let's say we back it up to
24 11:10 or 11:15. Can we get the jury seated by eleven o'clock?
25 The answer is "possibly but probably not."

1 So I think most likely, if we are making good time,
2 and we get the jury seated by 11:00, 11:30, and there is time,
3 I will do preliminary instructions, but I won't make you do
4 openings.

5 By the way, is anybody planning taking more than 45
6 minutes for an opening?

7 MR. JACOBSON: No, Your Honor.

8 THE COURT: Then starting first thing on Thursday
9 morning with openings and moving right to a witness is most
10 likely what we will do.

11 MR. O'NEAL: I apologize.

12 THE COURT: No need for apologies.

13 MR. O'NEAL: I didn't do my client a service. I said
14 I was going to do something during the course of the day, and I
15 learned I hadn't. We do intend to bring in conjunction with
16 this trial, probably around the time of post-trial motions, a
17 motion with respect to decertifying the class.

18 THE COURT: Sure.

19 MR. O'NEAL: Just to give you a heads-up, we think
20 there are all kinds of legal issues that make this class
21 unwieldy, and it should in fact be decertified.

22 THE COURT: And I'll tell you right now, based upon
23 my reading of the file, and I have read most of the file.
24 Given that I don't expect the jury portion of the case will
25 last particularly long, given that I'm taking the willfulness

1 and knowingly for myself, most likely I will reserve ruling or
2 deny with leave to renew a judgment as a matter of law at the
3 close of plaintiff's case. I will certainly take a look at any
4 motion to decertify, but I'm not going to rule on it probably
5 during trial.

6 So we will see what the jury does, and then we will
7 talk about what more needs to be done and addressed after that.

8 MR. O'NEAL: Understood, Judge.

9 THE COURT: That's most likely what I'm going to do.

10 To the extent you want to say, just to keep things
11 moving, when plaintiff rests its case, if you want to reserve
12 your argument for judgment as a matter of law until the close
13 of all evidence, I'll let you do that without prejudice;
14 without waiving any rights. But don't plan on making the
15 world's most brilliant argument at the close of plaintiff's
16 case and winning it right then. I just don't see really a
17 benefit of doing that given that we are not talking about a
18 particularly long jury trial. We can let the jury solve their
19 problems. I'll then solve your problems -- both sides
20 afterwards -- and then everybody will have a good, clean
21 appellate record.

22 All right. I look forward to seeing you all on
23 Monday at 11:00 a.m. If some reason emergencies arise, and you
24 need to reach me, contact my courtroom deputy.

25 I'll be sending you the drafts by email to everybody

1 who is already registered on the Court's PACER system or
2 CM/ECF.

3 Thank you, Dennis.

4 Thank you, Mary.

5 (Court adjourned.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/ Dennis W. Apodaca
DENNIS W. APODACA, RDR, RMR, FCRR, CRR
Official Court Reporter

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